SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, International Business Machines Corporation ("IBM"), respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1973.

Opinions Below

The district court's Contempt Opinion, filed on August 1, 1973, is at II App. H.* The Contempt Order is found at II App. G.

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* References to "II App." are to the concurrently submitted separate Appendix containing relevant portions of the Record since the filing of IBM's earlier and still pending applications in this Court for review of the district court's holding (the "Waiver Order") that IBM's attorney-client and work-product privileges were waived by complying with the order of another federal court. Those applications are described in IBM s concurrently filed Petition for a § 1651(a) Writ to the United States District Court for the Southern

The December 17, 1973, decision of the Second Circuit, holding (2-1) that the Court of Appeals lacked jurisdiction to review the Contempt Order by appeal or mandamus, has not yet been officially reported and is at II App. I.

Jurisdiction to Review

This Court has jurisdiction to issue the prayed-for Writ under 28 U.S.C. § 1254(1) or 28 U.S.C. § 1651(a).*

Questions Presented

This Petition (like other applications for review filed in this Court on this matter) fundamentally seeks review of the district court's ruling that a party's attorney-client and work-product privileges are waived by involuntary and inadvertent production of documents to another litigant in response to the document production and protective orders of another federal court.**

District of New York seeking direct review in this Court of the Contempt and Waiver Orders.

References to "App." are to the separate printed Appendix previously submitted by IBM in connection with the earlier applications in this Court for review of the Waiver Order.

* Because the Court of Appeals found it lacked jurisdiction over the merits of the appeal, there may be some question whether the case was "in" the Court of Appeals within the meaning of 28 U.S.C. § 1254(1). *House* v. *Mayo*, 324 U.S. 42, 44 (1945). In such a case this Court may exercise jurisdiction under 28 U.S.C. § 1651. *In re 620 Church St. Building Corp.*, 299 U.S. 24 (1936). In the event this Court finds that this case was not "in" the Court of Appeals, IBM has annexed to this Petition as Exhibit A a motion for leave to file, and to treat, this Petition as a Petition for a common law Writ of Certiorari to the Court of Appeals for the Second Circuit. *See Rule 30 of the Rules of the Supreme Court of the United States.*

** If this Court finds that the Second Circuit erred in not asserting jurisdiction over that question, this Court may itself review the underlying merits of the Contempt Order by means of this Writ of Certiorari rather than remand the case to the Court of Appeals for its determination. *House* v. *Mayo*, 324 U.S. 42, 44-45 (1945). Therefore, Petitioner incorporates by reference the argument on the underlying merits in its concurrent Petition for a § 1651 Writ directed to the Southern District of New York.

The reasons why this Court should review the merits underlying the district court's Contempt Order are separately covered in IBM's concurrently filed application for an extraordinary writ pursuant to 28 U.S.C. § 1651. In this paper, argument is limited to the following questions presented by the decision of the Court of Appeals that it was without jurisdiction to review the Contempt Order:

1. Whether the Court of Appeals had jurisdiction to review the Contempt Order of the district court below (by appeal or mandamus) because the Order, although styled a "civil" contempt,* in fact was at least in part not a "civil" contempt for these reasons:

(a) it was entered for the purpose of vindicating the district court's authority;

(b) it was entered without consideration of the character and magnitude of the harm which would be suffered, if any, by the Government by reason of failure to obey the district court's Waiver Order (indeed, the question of harm was ruled irrelevant by the district court); and

(c) it directs a staggering daily fine of $150,000 for each day of noncompliance—a sum which has no ascertainable purpose other than to vindicate the district court's authority and (since the district court refused a stay) to preclude testing the validity of its production order (the fine was stayed by the Second Circuit on January 2, 1974, pending this Court's final disposition of the matter).

2. Whether, even if the Contempt Order be considered wholly "civil", the especially compelling circumstances here—including the facts that (i) this contempt is a good faith challenge to the merits of the Waiver Order (which invades a fundamental

* If the Order was, in substance, wholly or partially criminal, the Government conceded and the Second Circuit recognized that the Court of Appeals would have jurisdiction to entertain an appeal. (II App. I, at 161a-162a)

right), (ii) without appellate review of the Contempt Order now, IBM will suffer irreparable injury by giving the Government its privileged documents, and (iii) the Contempt Order is in every respect final, nothing of it remains in the district court below, and it is unrelated to the merits of or relief sought by the antitrust action, which is continuing now with no interruption—make this case like the decisions of this Court approving appellate review of such orders.

These questions focus upon the misuse of form—the adoption of the label and some trappings of "civil" contempt—in what we believe was a transparent attempt by the Government and the district court to cut off substantive rights by shielding the Contempt Order (and the underlying Waiver Order) from review by higher authority. In Point 1 we emphasize the important, but essentially technical, reasons why the Contempt Order here should be treated as wholly or partially "criminal" and, therefore, appealable. In Point 2, however, we try to lay this Contempt Order alongside this Court's policies governing appealability. These policies, we submit, do not result in the exaltation of form over substance and assure appellate review when it is fundamentally unfair not to review a significant decision of an inferior court affecting vital rights and principles.

Statutes Involved

The statutes involved in this case are 28 U.S.C. § 1291 and § 1651(a), and 15 U.S.C. § 29, which are set forth at the end of this Petition.

Statement

The contempt adjudication below originated in the attempt of IBM, and its attorneys, to secure prompt appellate review, in the manner repeatedly suggested by the Govern-

ment, of an Order compelling the production of privileged documents—an Order found unlawful by the only judges to reach the merits on two appeals in which a majority of the Court of Appeals held that Court was without jurisdiction.

On August 1, 1973, the district court held IBM in contempt of that Pretrial Order and fined it $150,000 per day each day that Order was not complied with. By the express terms of the Contempt Order, this penalty continues until "this action is finally terminated and all appeals have been completed." (II App. G, at 140a)

Thus, the district court ordered IBM to pay more than $1,000,000 per week and more than $54,000,000 per year* unless it bows to the Waiver Order which was not only once held unlawful, but which (i) is based on a rule of law in direct conflict with the rules and precedent of this Court, (ii) retroactively annuls the protective orders of another district court, (iii) destroys a fundamental substantive right—the right to the attorney-client privilege, (iv) stands in direct conflict with the rulings of other federal courts on similar facts, and (v) nullifies the efforts of another United States District Court to administer a complex and document-laden case in an efficient and expeditious manner.

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* The Government's antitrust action does not seek damages, but if proceedings in that action were to last five years, IBM would have to pay more than $273 million and forfeit more than $50 million in interest (compounded at 7%) if it could not obtain review of the merits of the Waiver Order now, and nevertheless still sought to keep the privileged documents from the Government. Despite the suggestion of the Second Circuit's majority to the contrary (II App. I, at 170a), this is not a meaningful or realistic alternative: how could IBM ever justify spending sums of that magnitude on the speculation that (a) it will lose the antitrust judgment, *and* (b) it will obtain reversal on the merits of the Waiver Order in its appeal from the final judgment?

No justification was stated for the unprecedented—indeed, devastating—fine imposed by the district court except "the court's belief that a substantial fine is required to insure compliance with its order." (II App. H, at 150a)

There were no findings (and there was no evidence) of grave national peril, impending catastrophe or disaster, or disrespect for the authority or person of the district court. Indeed, on the Government's motion to suppress discovery sought by IBM before the contempt hearing began, the district court ruled irrelevant the questions of whether the Government would be harmed by not receiving the privileged documents and the extent of any such harm (II App. E) and his findings of fact reject any suggestion of harm.* (II App. H)

The Court of Appeals—despite this Court's decision in *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947), that a court "must . . . consider the character and magnitude of the harm threatened by continued contumacy" before imposing a civil contempt order—held, *inter alia*,

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* If the question of delay of the antitrust litigation were properly in issue, as it is *not* under the district court's rulings, IBM would show that the reason this case has not been concluded is because the Justice Department has failed to prosecute with any vigor. From January 1969, when the antitrust case was filed, until 1972, the Government did almost nothing to prosecute it, relying instead on discovery in private antitrust actions against IBM, primarily in the District of Minnesota. In addition, the Government waited some 17 months to bring on the motion which led to the entry of the Waiver Order.

Nor is there any basis for suggesting that production of privileged documents has been opposed for the purposes of delaying this action. The fact is that two well-funded private antitrust cases against IBM, *Greyhound* v. *IBM* and *Telex* v. *IBM*, have been filed and tried during the time the Government's action has been pending. Both companies are competitors of IBM, and their actions were tried after full discovery within 20 and 15 months after their respective filing dates. In contrast, the Government action has been pending for 60 months.

that this was a "so-called requirement" (meaning that it was not a requirement at all) "propounded without explanation or citation". (II App, I, at 165a) The Government had never argued for this construction of the *Mine Workers* case and, in dissent, Judge Timbers found that decision "utterly emasculate[d]" by the majority.*

The Court of Appeals also held that IBM "waived" its right to insist upon proof and findings concerning any harm to the Government "by objecting to the evidence of it". (II App. I, at 165a) IBM did object to the Government's offer of evidence, but the objection was made because—and only because—the district court had previously ruled

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* Judge Timbers wrote:

"The majority's suggestion that the district court's failure to 'consider the character and magnitude of the harm threatened by continued contumacy', *United States* v. *UMW, supra,* 330 U.S. at 304, is of no importance, strikes me as a side-stepping of what I had thought, prior to today's majority opinion, to be a decision of the Supreme Court binding upon our Court. The majority says that the district court's refusal to weigh this consideration does not transform 'what would otherwise be civil contempt into a criminal contempt.' *Supra,* p. 5632. This ignores the stated purpose of the district court in holding IBM in contempt, and of the government in seeking to have it held in contempt. With due respect, I must say that the majority's strained reading of *UMW* as requiring merely 'that the coercive fine be reasonably set in relation to the facts, that it not be arbitrary', utterly emasculates that landmark decision of the late Chief Justice Vinson. How can a contempt fine be reasonably or non-arbitrarily set if the 'facts'—i.e. the harm caused by the contumacious conduct, as well as the character and magnitude of that conduct—are not even explored? It would have been no more impossible to determine the harm sustained in the instant case than it was to determine the harm caused by the nation-wide coal miners' strike in *UMW.* Furthermore, the district court's failure to consider this issue affects not merely the *amount* of the fine, as the majority suggests; it goes directly to the *nature of the contempt adjudication. United States* v. *UMW, supra,* 330 U.S. at 304." (II App. I, at 183-184a)

the subject matter (*i.e.* harm) irrelevant, on the Government's motion.*

The only articulated basis for the district court's "belief that a substantial fine is required" was "the desire of the court to insure that its order [the Waiver Order] be promptly obeyed." (II App. E, at 98a) This is the hallmark of a "criminal" contempt and has no proper role in a "civil" proceeding, but this was ignored by the Court of Appeals' majority when it held that the Order had "a clearly civil purpose". (II App. I, at 165a)

It is also clear from the district court's Contempt Order, both from the amount of the penalty it set and its refusal to stay enforcement, that by "promptly" the district court meant without opportunity for appellate review.** Yet it was the very desire for such appellate review that led to the contempt proceedings in the district court. All that IBM has ever sought is an expeditious appellate determination of the merits of the Waiver Order and the substantial issues underlying it. That IBM's challenge to the Waiver Order is not frivolous is best demonstrated by the fact that the only appellate judges to reach

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* IBM's objection merely conformed to the ruling made at the Government's request (which the Government then proceeded to ignore by offering what it claimed was proof of harm); the majority's conversion of IBM's objection into IBM's "waiver" of another substantive right demonstrates again the error and substantial prejudice of not confining the concept of "waiver" to situations where there is plainly "an intentional relinquishment or abandonment of a known right or privilege". *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938).

** There never was any issue concerning whether the Waiver Order would be complied with if upheld on appeal. IBM has repeatedly stated it would comply in that event. It has also repeatedly offered to produce the documents at any time for a determination of the validity of its privilege claims. So there is no defiance of Judge Edelstein's authority here and, consequently, no need whatsoever to "vindicate" it.

the merits, a panel of the Second Circuit, vacated the Order as a "clear abuse of discretion" and "usurpation of power" which "disrupts the administration of justice in the federal courts."* (471 F.2d at 512, 516-17; App. K, at 47a, 56a)

Over the Government's strenuous opposition, however, the same panel of the Second Circuit which held that Court without jurisdiction to review the Contempt and Waiver Orders also unanimously granted a stay of its mandate (and thus of the two orders) under Fed. R. App. P. 41(b). Under that Rule, the stay will continue until "final disposition" by this Court. The stay, we believe, can be taken as acceptance of IBM's argument that the Court most familiar with the controversy and the underlying merits of IBM's position on the Waiver Order should act (despite its found lack of jurisdiction on the merits) to assure that IBM's right to seek review in this Court would not be prejudiced.

The Government—acting more like a sharp private litigant than a representative of the broad public interest —not only opposed any stay by the Court of Appeals or by the district court, but also flatly opposed IBM's motion in the district court that any contempt order issued be one which, in form, was plainly appealable to the Court of Appeals. This was *after* the Government stated on four separate occasions in this Court and the Court of Appeals that IBM's appeals were the wrong route and that a proper way to secure review of the Waiver Order was for IBM "or its representative" to risk contempt and thereby demonstrate the good faith and solid basis for their objections to the Waiver Order. (II App. M, N, O & P)

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* The Court of Appeals subsequently held *en banc* (4-2) that it lacked jurisdiction to review the Waiver Order on the merits. IBM previously has petitioned this Court for a writ of certiorari to review the Second Circuit's *en banc* decision [*petition for cert. filed,* 42 U.S.L.W. 3033 (U.S. June 11, 1973) (No. 72-1662)].

The Government's unconscionable abandonment of this position came as soon as it had the opportunity to seek enforcement of the Waiver Order.

On June 15, 1973, with all stays of the Waiver Order having expired, IBM's senior counsel, Bruce Bromley, respectfully and reluctantly asked the district court to hold him in contempt so as to resolve expeditiously the substantial legal questions underlying the Waiver Order—questions which even the district court's contempt decision concedes are of "significant interest" and which arise out of what the Court of Appeals has termed a "unique factual situation". (II App. H, at 148a; II App. I, at 169a)

But once the die had been cast, the Government suddenly changed its position and demanded contempt sanctions in excess of $175,000 per day against IBM, and not against a non-party representative of IBM, believing this would make the Waiver Order unappealable and trying to coerce IBM into foregoing any attempt to seek review on appeal. The Government renounced its repeated prior representations in this Court and the Court of Appeals concerning the appropriateness of the contempt route to appeal, and instead urged now that those representations should not be "looked at or honored". (II App. B, at 15a)

The district court accepted the Government's unseemly suggestion, entered an unprecedented daily fine of $150,000, and simultaneously denied a stay pending appeal. In so doing, it ignored the motion of IBM's counsel that Mr. Bromley or his firm be held in contempt and nominally fined so as to permit prompt and sure appellate review on the merits. And, as noted above, it separated out—artificially and erroneously, we submit—the "issues" of "fine" and "harm", deferring for some unspecific future time a

hearing on the "harm issue"—a hearing which has not been held.*

Reasons For Granting The Writ

IBM's concurrently-filed application for "all writs" review shows why review is required of the Contempt Order and the underlying Waiver Order. In this paper we shall show that review is also warranted of the Court of Appeals' decision that it lacked jurisdiction to review the Contempt Order (and the underlying Waiver Order) because, in so holding, the Court of Appeals decided an important federal question which has not been but should be settled by this Court, has misapplied applicable decisions of this Court, and, as the consequence of its decision that it lacks jurisdiction, has permitted to stand such a grievous departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The district court's Contempt Order, which the Court of Appeals held to be nonappealable, squarely fits neither the definition of a civil contempt nor of a criminal contempt.

The record compels the conclusion that this unusual Order was the product of the desire of the district court and of the Government to enter a punitive order which would be immune from appellate review. Thus, the form of order suggested by the Government and adopted by the district court was an attempt to fall within the rule of *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936), which held the order of civil contempt against a party to the action not appeal-

* The district court also ignored IBM's respectful and reluctant request that it be plainly held in criminal contempt (II App. K) and it refused to entertain the motion of IBM's counsel, Cravath, Swaine & Moore ("Cravath"), to intervene as of right in order to protect its work-product interest in documents covered by the Waiver Order. The district court's denial of Cravath's intervention motion is the subject of a concurrently-filed direct appeal to this Court by Cravath under § 2 of the Expediting Act.

able.* But this Court, in *United States* v. *United Mine Workers of America, supra*, 330 U.S. at 303-304, plainly held that the basis of any "civil" contempt order is some showing of the harm suffered by the opposing party as a result of noncompliance with the underlying order. Here, there was no proof of any harm suffered, let alone harm that in any way could justify the punitive fine which, in the district court's view, was necessary to vindicate its authority. But while the district court abrogated the necessity of showing any harm, to give the order the trappings of a "civil" contempt, the astronomical fine imposed was in form made "purgeable" and the Order was labeled as a "civil" contempt.

The resulting Order has substantial attributes of an order of criminal contempt, and one—purgeability—of civil contempt. It can be viewed as a hybrid order. If so treated, no decision of this Court has dealt squarely with the appealability of such an order, although there is ample authority that an order partly criminal and partly civil in nature is appealable. This Court should pass upon this question and should hold that the Order below, however viewed (*i.e.*, as criminal, partly criminal, or hybrid) is appealable.

And, fundamentally, the result should be the same even if this Court were to agree with the Court of Appeals and characterize the Order as "civil"; where formal labels obscure analysis and do not and cannot alter the practical

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* For reasons stated *infra* (at 13-14), we believe *Fox v. Capitol Co.* distinguishable under the circumstances here because (i) the contempt order here is completely final and separate from the antitrust case, (ii) unlike *Fox*, purging the contempt order here by producing privileged documents for examination by a litigant results in immediate and irreparable injury while purging the *Fox*-type contempt is a meaningful alternative to remaining in contempt, and (iii) unlike *Fox*, this contempt proceeding involves a good faith challenge on an appropriate ground to the underlying validity of the order sought to be enforced.

consequences of the order, they should be disregarded. When they are disregarded and attention paid to the practical consequences of the Contempt Order, it is the kind of order from which appeals are (and should be) permitted.

The record here is clear that the Order appealed from basically sought to vindicate the district court's authority. It had no relationship to any harm suffered by reason of noncompliance with the underlying order, and while the astronomical fine is purgeable by the contemnor, it is purgeable only at the price of suffering irreparable damage. Either way—paying of the fine, or disclosing the privileged documents—the consequence of the Order is to inflict irreparable injury or punishment on IBM.

A majority of the Court of Appeals accepted the "civil" contempt label, focused upon the Order's theoretical purgeability, disregarded the devastating and irreparable consequences of purging (which make purging only a theoretical alternative), overlooked the trial court's avowed purpose to vindicate its authority, found that proof of the harm suffered by noncompliance was not a necessary element in civil contempt, and concluded that the Order was nonappealable.

The result, in this era of growing government interference with the rights of individuals, is to vest in the district courts an awesome power to issue and fashion punitive but nonreviewable contempt orders, where the consequences of compliance are as devastating as the consequences of defiance, and thereby to coerce compliance with their orders, even if an order is—as the order in this case has been characterized—a "gross abuse of discretion" and a "usurpation of power" which "not only violates the rights of a private party (IBM) but also disrupts the administration of justice in the federal court system". (471 F.2d at 512, 516; App. K at 47a, 56a)

All of this resulted from what we believe to be a misapplication of the rule in *Fox* v. *Capitol Co.*, and a clear

failure to follow the requirements laid down for civil contempt by this Court in *United Mine Workers*. *Fox* held a civil contempt order against a party to be nonappealable. But the order in *Fox* was a genuine civil contempt order, related to the harm suffered by reason of noncompliance with the underlying order, and purgeability was a meaningful alternative.* The Court of Appeals misapplied *Fox* and also disregarded the doctrine of *United Mine Workers* that in assessing a civil fine the court "must . . . consider the character and magnitude of the harm threatened by continued contumacy . . ." 330 U.S. at 303-304. In addition, the Court of Appeals disregarded holdings by it and by this Court that where, as here, a civil contempt against a party has essential elements of finality, and where the sanctions are unrelated to the relief sought in the main case, even if denominated a civil contempt, the order is appealable.

We submit that the Court of Appeals has jurisdiction—even in what is otherwise an Expediting Act case—to review the sort of contempt order entered here (which cannot, because of its immediate irreparable effect, practically be reviewed after final judgment) because the Contempt Order is either wholly or partially criminal in substance, and because, even if the district court's conclusionary characterization of the Order as "civil" is accepted, this Court's decisions show that this Contempt Order is in every meaning-

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* *Fox* involved a judgment debtor held in contempt for failing to respond to a subpoena requiring his attendance at a supplementary proceeding for examination by his creditor. 299 U.S. at 106. The judgment debtor had confessed judgment (Statement and Confession of Judgment, *Capitol Co.* v. *Fox*, No. L 59-192 (S.D.N.Y. May 3, 1935)), and judgment had been entered on the confession (Judgment, *Capitol Co.* v. *Fox*, No. L 59-192 (S.D.N.Y. July 18, 1935)). Thus, noncompliance with the subpoena was not a challenge to the validity of the underlying judgment. Moreover, the absence of an appeal cost the judgment debtor nothing he had not already given up by his confession of judgment since the civil sanction imposed was incarceration pending his decision either to comply with the subpoena or to pay a fine in the amount of the unpaid judgment.

ful sense "final"; and since it was entered in a proceeding separate from the antitrust action below, it is outside the scope of the Expediting Act, 15 U.S.C. §29.

A. The Contempt Order is Final Because it is Essentially a Criminal Contempt Order.

It is conceded by the Government and by the majority in the Second Circuit that, if the Contempt Order is criminal in nature, it is appealable to the Court of Appeals. (See II App. I, at 161a-162a)* We submit that, as Judge Timbers stated,

> "Viewed realistically, the clear purpose and effect of the [contempt] order is criminal in nature." (II App. I, at 181a)

While the distinction between civil and criminal contempt is a murky one, and has been the subject of innumerable attempts to draw a fine line, the district court left no doubt that the purpose of its Contempt Order was punitive —to vindicate the trial court's authority.

That was the theory advanced by the Government (which argued that the Contempt Order was necessary "to insure . . . respect for the court's orders by IBM" and "to vindicat[e] . . . this Court's authority to issue and enforce such orders");** and that was the justification accepted and

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* Even if some part of the Contempt Order could properly be treated as a "civil" contempt, the fact that any part of it is criminal in nature is sufficient to permit immediate appeal from the entire Order. *Union Tool Co.* v. *Wilson,* 259 U.S. 107, 110 (1922); *In re Merchants' Stock and Grain Co.,* 223 U.S. 639, 642 (1912); *In re Christensen Engineering Co.,* 194 U.S. 458, 461 (1904).

** These statements were contained in briefs submitted by the Government in the contempt proceedings in the district court, but, as Judge Timbers wrote:

> "The majority further ignores the purpose for which the government argued that the contempt order should issue. At the July 16, 1973 hearing, government counsel argued that IBM

announced by the district court (which wrote that the Contempt Order was based on "the desire of the court to insure that its order [the Waiver Order] be promptly obeyed" (II App. E, at 98a)). Indeed, the district court had no other basis on which to enter the Contempt Order since it ruled irrelevant—and therefore permitted no discovery, took no evidence, and made no findings on—any harm to the Government arising from noncompliance with the Waiver Order.

The Contempt Order also is criminal in nature because, as Judge Timbers put it, "[b]y completely excluding the issue of damages in straining to frame a civil remedy," the district court ignored the rule of this Court that in assessing a "civil" fine to assure compliance the court "must . . . consider the character and magnitude of the harm threatened by continued contumacy . . ." *United States* v. *United Mine Workers, supra,* 330 U.S. at 303-304. (II App. I, at 181a) Here, the district court gave no such consideration.

Moreover, we are not aware of any contempt order ever issued, let alone any order of civil contempt, resembling in any way the severity of the penalties the district court imposed here.

Simply labeling the order "civil contempt" and adopting formal boilerplate recitals cannot prevent the appellate courts from determining the true nature of the Order.

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should be held in contempt because of the necessity 'to have a precedent in this Court that IBM will obey the Court's orders and will obey them promptly and will obey them as they are directed to obey them and not on the basis of whether they want to or don't want to.' Transcript of July 16, 1973 Hearing, at 6. The government's purpose in seeking contempt clearly was to punish past conduct and to deter future conduct. This is a criminal sanction. *McCrone* v. *United States,* 307 U.S. 61, 64 (1939); *MacNeil* v. *United States,* 236 F.2d 149, 154 (1 Cir.), *cert. denied,* 352 U.S. 912 (1956); *United States* v. *International Union, United Mine Workers,* 190 F.2d 865, 873 (D.C. Cir. 1951)." (II App. I, at 182a-183a, n.7)

It is the "character and purpose" of the Contempt Order which determine whether the citation was for criminal or civil contempt. *United States* v. *United Mine Workers, supra,* 330 U.S. at 303-304; *McCrone* v. *United States,* 307 U.S. 61, 64 (1939).

As the Court said in *McCrone, supra,* 307 U.S. at 64:

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (Footnotes omitted)

Not only was the proceeding below not "wholly remedial," it was not remedial at all, since Judge Edelstein prevented any consideration of whether any harm had occurred or would occur by the withholding of documents pending appellate review of the Waiver Order. In so doing, the Court excluded from its consideration the basis for any civil contempt sanction.

Moreover, as Judge Timbers observed, the record below is "crystal clear" that the district court's failure to comply with the "indispensible requirements for a civil contempt adjudication was deliberate and not inadvertent":

> "In its order of July 3, 1973 scheduling a hearing for July 16 'limited to the issues of the fine and damages to be assessed against [IBM] for its alleged contempt', the court excluded any consideration of the 'character and magnitude' of the threatened harm and the 'effectiveness' of any suggested sanction. Moreover, by its order of July 10, the court excluded from the July 16 hearing any consideration of the 'question of damages' caused by IBM's alleged contumacious conduct. Thus, the only evidence before the court was IBM's balance sheet." (II App. I, at 181a-182a)

In brief, it is fundamental to and inherent in the nature of a "civil" contempt that harm or injury to the complaining party be the interest shown and found to be served by the sanction because "contumacy non-injurious to the adverse party . . . if contempt at all . . . is criminal." Comment, *Civil and Criminal Contempt in the Federal Courts,* 57 Yale L.J. 83, 99 n.93 (1947).*

But in this case, the purpose sought to be accomplished by the Contempt Order is not to remedy any harm suffered by the Government. There was no consideration, no proof and no finding of harm. The size of the fine, the selection of the form of the remedy, the failure to act upon Cravath's motion to intervene, the denial of the motion for a plainly appealable order, and the entire tenor of the

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* In a civil contempt proceeding "the complainant in the main cause is the real party in interest with respect to a compensatory fine or other remedial order in a civil contempt proceeding . . ." *Parker* v. *United States,* 153 F.2d 66, 71 (1st Cir. 1946). As a result, a compensatory fine must be based on hearing evidence of "actual loss" or damage to complainant. *United States* v. *United Mine Workers, supra,* 330 U.S. at 304; *see also Yanish* v. *Barber,* 232 F.2d 939, 947 (9th Cir. 1956). For example, in *Boylan* v. *Detrio,* 187 F.2d 375 (5th Cir. 1951), the court stated the rule that "a civil contempt exists *only* where there is a disobedience of court orders to the *damage of the other party.* . . ." 187 F.2d at 379 (emphasis added). *See also United States* v. *Aberbach,* 165 F.2d 713, 715 (2d Cir. 1948) (there must be a "reasonable relationship between fine and damages"); *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 F. 774, 782 (2d Cir. 1905); ("It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive"); *McKee Glass Co.* v. *H. C. Fry Glass Co.,* 248 F. 125, 127 (3rd Cir. 1918). (" 'In fixing penalties for civil contempts, it seems to the court important that care should be taken to give the plaintiff full compensation for the injuries sustained, *and not more*' "). (Emphasis in original) There are also cases, particularly those involving witnesses who refused to testify before grand juries, where imprisonment is used as a civil contempt sanction. *See, e.g., Shillitani* v. *United States,* 384 U.S. 364 (1966). But even in such cases the question is "what does the court primarily seek to accomplish by imposing sentence?" (384 U.S. at 370)

proceedings in the district court made it clear that the principal—if not the sole—purpose was to punish IBM if it failed to bow to the court's power over it, to vindicate the court's authority, and to prevent any challenge to that authority in any other court.

Purgeability does not erase the essentially criminal aspects of the Order, especially when the consequences of purging are, as they are here, the inflicting of irreparable injury.

In these circumstances, the Order is criminal, in whole or in part. In either event, it is final for purposes of appeal. The only nonfinal element is which form of punishment IBM shall suffer.

B. The Contempt Order is Final (Whether Criminal, Civil, or Both) Because the Damage Occasioned by the Order is Immediate and Irreparable Whether IBM Produces the Privileged Documents or Pays an Astronomical Fine.

Even if the Contempt Order is properly regarded as "civil", it is nevertheless appealable under the principles laid down by this Court in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), and by the Second Circuit in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (1971). Here, as in those cases, there is a good faith challenge to the validity of the underlying order, the order effects rights which are very important, and appeal should be available to test the validity of the challenge.

Reisman was an action brought by lawyers seeking to set aside summonses directing the production of documents assertedly protected by attorney-client and work-product privileges. So that "no injury [would be suffered] by testing the summons", the Court held that, "whether the contempt be of a civil or criminal nature", it is "appealable". (375 U.S. at 449)

In *Reisman*, sections of the Internal Revenue Code which authorized the summons procedure were challenged on the ground that

> "the penalties of contempt risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judicial review". (375 U.S. at 446)

The Court found the Internal Revenue Code procedures constitutional because their punishment procedures do "not apply where the witness appears and interposes good faith challenges to the summons". 375 U.S. at 447. The Court noted that, so long as the challenge is in "good faith", no punishment could be imposed and "the witness may challenge the summons on any appropriate ground". 375 U.S. at 449. An "appropriate ground" was specifically held to include an assertion that the documents requested were "protected by the attorney-client privilege". (*Id.*)*

Reisman rests upon more than fifty years of constitutional law developed as a result of attempts, like those made here, to obfuscate, penalize or prevent judicial review. *See Ex Parte Young*, 209 U.S. 123, 147 (1908); *Wadley Southern Ry. Co.* v. *Georgia*, 235 U.S. 651, 661-662 (1915); and

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* *See also United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1970) (contempt order enforcing summons stayed and ultimately reversed, relying upon *Reisman*, and stating that

> "[h]ere . . . [the person held in contempt] stood to forfeit his defenses entirely [if he complied with the subpoena]", and
> "[h]ad . . . [the person held in contempt] testified or produced his records on the appointed dates, he would of course have mooted the appeal" (420 F.2d at 853));

Harris v. *United States*, 413 F.2d 314 (9th Cir. 1969) (relying upon *Reisman* in granting an attorney a stay of an order denying a motion to quash a subpoena directed to a bank which called for production of documents the attorney claimed were privileged); *Wilmot* v. *Doyle*, 403 F.2d 811 (9th Cir. 1968) (relying upon *Reisman* (403 F.2d at 814 n.5) and reversing an order holding an NLRB attorney in contempt for failure to produce documents).

Oklahoma Operating Co. v. *Love,* 252 U.S. 331, 336-337 (1920).* Thus, this Court wrote in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226 (1961):

> "As it was said in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 654 (1950), 'we are not prepared to say that courts would be powerless' to act where . . . orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity." *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226 (1961).**

Here, the sanctions sought by the Government and imposed by the district judge are so enormous that they necessarily would in effect prevent any appeal at all. Yet here, as in *Reisman,* there is no question but that IBM and Cravath have sought an appeal in "good faith" and on "an appropriate ground". Due process, then, as interpreted by this Court, requires that there be an appeal here so as to test the merits of the Waiver Order.

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* The constitutional principle at work—inherent in the right to due process—was first developed in cases, such as those cited above, where a statute or administrative regulation was sought to be tested but judicial review was impeded, and compliance coerced, by penalizing disobedience during the period of the test. Obviously, the same principle applies to the decision of a federal district judge. For no rational distinction can be drawn between a judge's decision and the collective decision of a legislature or agency. A constitutional principle applicable to one must equally be applicable to the other—and, in *Reisman,* this Court so held.

** That contempts in situations like this do not normally raise this kind of problem can be seen from cases like *United States* v. *Costello,* 16 F.R.D. 428 (S.D.N.Y. 1954), *aff'd,* 222 F.2d 656 (2d Cir.), *cert. denied,* 350 U.S. 847 (1955), where the court issued a contempt citation which allowed immediate review of a discovery order involving a claim of privilege. The court held that a "just" order was a $500 fine, stayed on the condition that an appeal was diligently prosecuted. *See also Appeal of Securities and Exchange Comm'n,* 226 F.2d 501 (6th Cir. 1955) and *Chapman* v. *Goodman,* 219 F.2d 802, 807 (9th Cir. 1955).

Whatever might be the relevance of the Expediting Act in the absence of a contempt citation raising the constitutional principle of *Reisman**, it is clear that the Expediting Act should not be interpreted so as to raise the question of its constitutionality:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Crowell v. *Benson*, 285 U.S. 22, 62 (1932) (Hughes, C. J.); quoted in Mr. Justice Brandeis' opinion in *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936); *accord United States* v.

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* The *Reisman* principle that there be no substantial sanctions imposed until there has been an opportunity for judicial review was also followed in one of the cases the Department quoted from in its Motion to Dismiss or Affirm in No. 72-1173 to support the proposition that contempt orders against IBM or its representatives "are the only routes available for review of pretrial orders requiring testimony or the production of evidence" (p. 16). The Department's quotation was from *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971), where the Court said:

> ". . . [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt *if* his claims are rejected on appeal. . . ." (Emphasis added.)

The "necessity for expedition in the administration of criminal law" is the same policy as that served by the Expediting Act in the administration of antitrust law. But just as in the context of criminal law, that policy is not frustrated (and, in fact, it is best served) by resolution of a serious claim that an order is invalid and will cause great harm in an appeal from a contempt order. We know of no decision by any court applying the Expediting Act to a contempt proceeding, and this is not surprising since the Expediting Act was never meant or thought to reach a situation like this.

Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); *Dennis* v. *United States*, 341 U.S. 494, 501 (1951); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 407 (1950); *United States* v. *CIO*, 335 U.S. 106 121-122 (1948): *United States* v. *Delaware & Hudson Ry.*, 213 U.S. 366, 407-408 (1909).

Reviewability of the contempt order is also demonstrated by the principles underlying this Court's decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), and by the Second Circuit's own decision in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (1971). In *Sibbach*, as here, there was an appeal from a civil contempt order against a party where the contemnor's purpose was to make a good faith challenge to the underlying order (to submit to a physical examination). Compliance with the order resisted there, as here, was not a meaningful alternative course of conduct because it would have caused irreparable injury to the interest for which protection was sought and thus substantially impaired any subsequent challenge to the underlying order.

Similarly, the decision of the Second Circuit in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (2d Cir. 1971), is square authority for finality—and appealability—in the circumstances of this case. There, in sharp and inconsistent contrast with its decision in this case, the Court held that an order holding the defendant union in civil contempt was final and appealable. The order imposed a substantial daily fine until such time as the union abandoned a strike. The amount of the fine there was substantially less than the amount of the fine here.

In finding the contempt order to be final and appealable, the Court found that:

> (i) ". . . execution issued immediately and the collateral proceeding has been concluded" (445 F.2d at 45);

(ii) "[j]udgments were entered on these findings of civil contempt and orders setting the fines" (*id.*);

(iii) "the district court's decision on this aspect of the case was not tentative" (*id.*);

(iv) "our intervention by way of appeal runs no risk of disrupting the orderly course of proceedings below" (*id.*);

(v) "[t]he cute phrase 'he carries the keys of the prison in his own pocket' . . . bears little relation to the instant case as it reaches us" (*id.* at 46); and

(vi) finally, "The Company's reliance upon *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936) [to defeat an appeal], is misplaced. There, an order finding the judgment debtor in civil contempt for his refusal to submit to an examination in proceedings supplementary to judgment was held to be nonreviewable because the proceeding was in its initial stages and the final relief was a matter of conjecture. *Id.* at 108. In the present case, the execution issued immdiately and the collateral proceeding has been concluded." (445 F.2d at 45)

So here.

The contempt proceeding was "collateral" and "has been concluded", the Contempt Order is entered and the fine set, nothing about the district court's conclusion was "tentative", there is "no risk of disrupting the orderly course of proceedings below", having the "keys of the prison" by having the theoretical ability to pay the fine is a "cute phrase" meaningless in the circumstances, and "reliance" on *Fox* v. *Capitol Co.* is "misplaced".*

In fact, unlike the relatively rare situation present here and that in *Reisman*, *Sibbach* and *New York Telephone*, it

* The Second Circuit majority distinguishes that Court's decision in *Telephone* on that Court's passing comment expressing "doubt" about what was left of the main action. (II App. I, at 167a) That "doubt" cannot take away from all the other reasons why the civil contempt order there was held appealable, each of which fit this case like a glove.

is only in the much more frequently occurring cases like *Fox*—where there was no challenge to the validity of the underlying order (on a "good faith" basis or any other ground) and where compliance with it would not cause irreparable injury or undercut the challenge itself—that immediate appeal has been denied.

C. If Not an Appealable Criminal Contempt, or an Appealable Final, Separable Civil Contempt, the Order Below Is Hybrid and Is Appealable.

No rule of law says that only criminal contempts against a party are appealable. No rule of law says that the Court of Appeals lacks jurisdiction over a contempt order unless it squarely fits prior definitions of criminal contempts. No rule of law says that a purgeable contempt order is necessarily nonappealable.

The issue is whether or not the order entered below has all those attributes, or such a sufficient number of attributes, as did the civil contempt order in the *Fox* case, so that a perceptive application of that precedent requires a finding of nonappealability.

The Order below does not match the order in the *Fox* case. It is not a "civil contempt" in the classical sense.

It has all the elements of finality which commend its reviewability. It is unrelated to the main case because the judge below severed its relationship to the main case when he refused to make any findings or hear any evidence as to the harm suffered by the complainant below as a result of noncompliance.

All of the considerations noted by Judge Timbers which lead to the conclusion that the Order is in essence an order in criminal contempt, and therefore appealable, also commend the conclusion that, if the Order be treated as the hybrid that it may be viewed as being (because of the purgeability element), it nevertheless should be accorded the same reviewability on appeal as a criminal contempt.

D. The Contempt Order Is Outside the Scope of the Expediting Act Because It Is Separable from the Government's Antitrust Case.

If the Contempt Order is criminal in nature, then it may immediately be reviewed by the Court of Appeals without running afoul of the Expediting Act.

In addition, we submit, that no Expediting Act issue arises even if the Contempt Order be found civil (yet final under the principles discussed above) because it is separable from the antitrust case. It is separable because both the Government and Judge Edelstein separated it from the antitrust case and because the sanction imposed by the Contempt Order (and sought by the Government) is separate, different and distinct from the relief sought in the Government's antitrust case.* And while the Government initially sought the contempt order because of alleged harm to its prosecution of the antitrust case, that position did not long survive.

For the district court severed the issue of what it would take to force IBM to comply with the Waiver Order from the issues relating to the impact of noncompliance on prosecution of the antitrust case by his order of July 10.

By that order, the district court ruled irrelevant any harm or injury or damage to the plaintiff in the prosecution of its antitrust case. And, the district court took no evidence on the impact, if any, of noncompliance on the antitrust suit. He made no findings on that question. Accordingly, the record contains no evidence and no find-

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* The cases which the Government cited to the Court of Appeals in support of its claim that appeal from a civil contempt judgment in a government antitrust action lies only to this Court are inapplicable here since in each case cited the critical point at issue was the interpretation and enforcement of the final judgment in the antitrust case. Clearly, an appeal in such a proceeding must go directly to this Court under the Expediting Act. *See United States* v. *California Cooperative Canneries,* 279 U.S. 553 (1929).

ings to connect the Contempt Order with the further prosecution of the antitrust case, or the relief there sought.

Moreover, the court below, as noted, made it clear that the dispute over compliance with the Waiver Order was one between it and IBM rather than between the plaintiff and IBM. Indeed, even the Government urged the entry of the contempt order, not to make the Government whole, but to vindicate the Court's authority—and the Court expressly entered the Order to accomplish that result.

As pointed out above, in our view this makes the contempt order a criminal one. But whether the Order be considered criminal, civil, or hybrid, the district court's separation of these issues plainly makes the Order separate from the antitrust proceeding and therefore outside the scope of the Expediting Act.

In addition, the sanction imposed by the Contempt Order is separable from the relief sought in the antitrust action. There are situations in which a contempt order provides a sanction which is squarely related to, and within the scope of, the action from which the order emanates. Such was the case in *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936), where the fine imposed was the amount of the judgment previously entered upon confession of judgment against Mr. Fox. Such would be the case if in an action for specific performance the defendant were directed by the contempt order to convey the property which was the subject matter of the action and provided that, if he failed to do so, the court would do it for him.

Such is not the case here. IBM could pay the fine imposed (if it could conceivably afford it) and the antitrust action would be totally unaffected. If the fine were paid, the Government still would have none of the relief directly or indirectly sought in its complaint. In contrast, in *Fox*, if the fine had been paid, the plaintiff would have had the relief sought in the main action.

The record, in short, we submit, demonstrates that by the Government's choice,* by the district court's choice, and by the nature of the sanction granted, the contempt order is separable from the antitrust case and appealable to the Court of Appeals. It is difficult to find any justification for suggesting that issues such as those raised by the Contempt Order were intended by Congress to be resolved by this Court and only after final judgment on the merits of the antitrust claim.

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* The Government not only sought a contempt sanction which was separate from the relief sought in its antitrust case, but it deliberately chose *not* to seek any other sanctions available under Rule 37(b) which would have, directly or indirectly, related to the antitrust action. Indeed, it is the very lack of relationship between the enforcement of this Order and the Government's antitrust case which makes any of these sanctions inappropriate, even in the Government's view.

CONCLUSION

For the above reasons, IBM urges this Court to grant this Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit (or, alternatively, to grant IBM's concurrently-filed Petition for a § 1651(a) Writ).

January 7, 1974

Respectfully submitted,

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EXHIBIT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York.

Respondents.

MOTION FOR LEAVE TO FILE AND TO TREAT ANNEXED PETITION FOR A WRIT OF CERTIORARI AS A PETITION FOR A COMMON LAW WRIT OF CERTIORARI

In the event this Court holds that the above-captioned case was not "in" the Court of Appeals within the meaning of 28 U.S.C. § 1254(1), Petitioner International Business Machines Corporation ("IBM") respectfully moves this Court for leave to file, and to treat, the annexed Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as a Petition for a common law writ of certiorari pursuant to 28 U.S.C. § 1651(a).

As so filed and treated, this common law Writ of Certiorari is directed to the United States Court of Appeals for the Second Circuit to review an order and judgment of that Court entered on December 17, 1973, which determined (2-1) that the Court of Appeals for the Second Circuit did not have power to entertain IBM's appeal (and concurrent Petition for Extraordinary Writ) to review a Contempt Order of the United States District Court for the Southern District of New York entered on August 1, 1973. The Contempt Order is predicated on noncompliance with a pre-

vious order (the Waiver Order) held unlawful by the only judges to reach the merits.

The Waiver Order orders IBM immediately to produce privileged documents to the Government on the grounds that IBM's previous production of those documents to a third party, pursuant to pretrial orders of the United States District Court for the District of Minnesota in a related case, constituted a waiver of IBM's attorney-client privilege despite uncontroverted facts (i) that IBM did everything humanly possible to prevent disclosure of its privileged documents, (ii) that the United States District Court for the District of Minnesota had, in the interest of expedition, ordered IBM not to take a final crucial step in IBM's privilege review process, and (iii) that the same United States District Court had concurrently entered a protective order expressly preserving IBM's privilege claims.

For the violation of the Waiver Order found by the District Court, IBM was held in contempt and directed to pay a continuing fine in excess of one million dollars per week.

January 7, 1974

Respectfully submitted,

.....

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STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1291 and § 1651(a) and 15 U.S.C. § 29 which provide as follows:

28 U.S.C. § 1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Expediting Act of 1903, as amended (15 U.S.C. § 29)

"In every civil action brought in any district court of the United States under any of said [anti-trust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

FILE
JAN 22
MICHAEL RODAK,

Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,
Respondents.

No. 73-1066

CRAVATH, SWAINE & MOORE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL MEMORANDUM FOR CRAVATH AND IBM

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January 21, 1974

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,

Respondents.

No. 73-1066

CRAVATH, SWAINE & MOORE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL MEMORANDUM FOR CRAVATH AND IBM

This supplemental memorandum is submitted to call attention to the following matters which were not available when the above review applications were filed on January 7, 1974, and which may make it unnecessary for this Court to consider the matter, at least for the present:

1. On January 7, 1974, counsel for Cravath and IBM were notified that the district court had issued a Memorandum (printed in the attached Appendix A) relating to

Cravath's July 16, 1973, application to intervene in the contempt proceeding against IBM. As elaborated below, that Memorandum (a) attempts to counter Cravath's assertions that the district court's failure formally to act upon Cravath's application to intervene constituted a denial, and states instead that the court has now concluded that the application has been (for five and one-half months) procedurally deficient, and (b) criticizes the making of the application but states that those views are "not intended to prejudice the applicant's right to bring on a motion to intervene in proper form". (App. A, at 6a)

2. Although this invitation to file a proper motion to intervene may be subject to some question in view of the circumstances, timing and substance of the Memorandum, it has been accepted at face value, particularly since the principles and rulings it announces suggest the necessity for vacation of the Contempt Order Against IBM. Thus this Court may again wish, as it has done before,* to defer consideration of the matter pending the disposition of the application which has been made in response to the district court's invitation. Or, if this Court does not wish to defer consideration, the district court's Memorandum strongly reconfirms the need for appellate scrutiny of the Waiver and Contempt Orders.

A. The circumstances and timing of the district court's Memorandum.

In seeking a stay from the Second Circuit against the running of the $150,000 a day fine imposed by the Contempt Order, IBM and Cravath committed to file in this Court on January 7, 1974, their papers to review the Waiver

* Review of the Waiver Order was deferred pending the Second Circuit's *en banc* decision of May 8, 1973 (see J.S. in No. 72-1173 at 10-11) and was subsequently again deferred pending the Second Circuit's review of the Contempt Order as suggested in counsel's letter of August 10, 1973, to the Clerk of this Court regarding Nos. 72-1173, 72-1661 and 72-1662.

and Contempt Orders and the denial of Cravath's application to intervene in the contempt proceeding to protect its work-product interest in documents covered by the Waiver Order. The Second Circuit granted the stay on January 2, 1974.

Accordingly, the review papers were printed over the weekend and filed in this Court on Monday, January 7—IBM's "all writs" petition to the district court (No. 73-1064), IBM's certiorari petition to the Second Circuit (No. 73-1065), and Cravath's Jurisdictional Statement (No. 73-1066). The Jurisdictional Statement asserts (at 15-16) that the district court's entry of the Contempt Order on August 1, 1973, and its continuing failure to act formally on Cravath's intervention application, constitutes a denial of that application. It also states (at 4, second footnote) that immediately after the December 17 decision of the Second Circuit, holding that the intervention application was not properly before it, counsel for Cravath reminded the district court of the application, but had received no response to date.

Meanwhile, unbeknownst to counsel, the district court filed the Memorandum on Friday, January 4, but counsel were not notified of it until almost noon on January 7.* The Jurisdictional Statement and other review applications were then on their way to Washington for filing to meet the commitment for filing on that day. As a result, they were filed without reference to the Memorandum, but the Clerk of this Court was concurrently informed about the Memorandum and was advised that it would be dealt with by a supplemental filing.

B. The substance of the district court's Memorandum.

The Memorandum replies to (and quotes) Cravath's assertions in the Second Circuit that the district court's

* The Memorandum is stamped as filed in the Clerk's office at 5:12 p.m. on Friday, January 4, but (apparently in view of the closing of the Clerk's office at 5:00 p.m. for the weekend) counsel were not notified of its existence until January 7.

continuing (5½ month) failure to act on the intervention application constitutes, when coupled with the Contempt Order issued against IBM, denial of the application. To this assertion the district court answers that it had failed to act on the application because it had been brought on by order to show cause, rather than by a regular motion returnable in ten days. Therefore, replied the court, it had been insufficient as to form under Local Rule 9(c)(4), because it was not accompanied by an affidavit stating why it was believed to be appropriate to proceed by order to show cause rather than by motion.*

We believe that this explanation, made at this late date, by the district court is inconsistent with reality and with the very first requirement of the Federal Rules of Civil Procedure that they shall be construed to secure the "just, speedy and inexpensive determination of every action."

The intervention petition, which was verified under oath, stated Cravath's need to intervene in the proceeding occurring that day because the Government threatened to "irreparably destroy the rights of Cravath in the subject matter of the proceeding" (J.S. 67a). This verified pleading setting forth the need for speed would seem to satisfy the purposes and meet the requirements of the local rule and we continue to maintain that the district court's inaction coupled with the outstanding $150,000 a day fine against IBM constitutes a denial of Cravath's application.

Nevertheless, Cravath has again requested the district court to grant its application. This was done pursuant to a statement at the close of the Memorandum. There the district court says that its criticism of the making of the application and its view that the intervention application was intended to "provide an appellate vehicle" is not "intended

---

* Rule 9(c)(4) states:

"No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary."

to prejudice" Cravath's right to renew its application absent the procedural infirmity which the court found to have existed. Although the prior history of this proceeding is not reassuring, it is believed that this invitation must be accepted, particularly since re-application should, for the reasons stated below, result in a vacation of the Contempt Order, and may make it unnecessary for this Court to consider the matter at this time.

C. The reasons for believing that Cravath's re-application for intervention to the district court may be successful and obviate the need for this Court's consideration.

The re-application points out that the principles and rulings contained in the Memorandum necessitate vacating the Contempt Order against IBM. This is so for two reasons basically:

First, the procedures followed by the United States in initiating and prosecuting the contempt proceeding did not comply with the requirements stated in the district court's Memorandum (*see* pp. 6-7, *infra*). The law must be even-handed; it is not fair to bind one litigant by one set of rules while another is free to disregard them. Accordingly, the entire contempt proceeding was infected by the infirmity the district court has just announced.

Second, unless the district court's recognition of Cravath's right to apply to intervene is to be regarded as a meaningless formality or as an attempt to frustrate appellate review, that right must be to seek to intervene in a proceeding where Cravath's rights have not already been extinguished. Accordingly, the Contempt Order must be open to re-examination if the invitation to re-apply for intervention is to be more than an empty phrase.

For these reasons we respectfully suggest that this Court defer consideration of the applications now before it, pending the district court's disposition of the new application to intervene. We shall promptly inform the Court of that disposition.

D. In the event this Court chooses not to defer consideration of the matter, the district court's memorandum confirms the position taken by IBM and Cravath in their pending applications in this Court.

The Memorandum demonstrates the finality of the district court's denial of the July 16 application to intervene and further demonstrates the need for appellate scrutiny of the district court's misuse of its powers.

As to finality: the Memorandum makes it clear that there is no application before the district court for intervention by Cravath, and that it denied the prior application for intervention, finally and completely.

As to the need for appellate scrutiny: in handing down its Memorandum the district court acted *sua sponte,* ruled against Cravath on a ground never urged by the Government,* and inconsistent with the Government's position and procedure in the contempt proceedings, waited five and a half months to raise, for the first time, its own technical objection to the intervention application, and thus again demonstrated its desire to enforce its Waiver Order without appellate review and without regard for the substantial rights thereby extinguished.

The district court's application of a local rule to deny that Cravath's intervention application ever existed is fundamentally unfair and totally inconsistent with the district

---

* Neither at the contempt "hearing" on July 16, 1973 nor at any time thereafter has there been an objection—indeed, even a suggestion—by the Government that Cravath's application was in any way procedurally deficient, let alone deficient under a local rule of the district court that was raised for the first time, *sua sponte,* by the district court five and a half months later. Moreover, at the "hearing" the Government did not suggest it needed additional time to respond. On the contrary, the Government sought to respond at the hearing "on the merits" of the application, but the district court ruled from the bench that the Government's "remarks about the [intervention] papers furnished to this Court today are stricken". (J.S. 43a; II App. F, at 112a)

court's treatment of the Government in the contempt proceeding—for if there was here a failure to follow any technical rule, the Government was guilty of the same fault. The Government commenced the contempt proceeding by an Order to Show Cause, which the district court signed the day it was submitted although there was no showing of the kind now required by the Memorandum why that expedited procedure (as distinguished from proceeding by Notice of Motion) was necessary. In fact, the district court later completely disregarded its local rules when, on its own initiative, it made a Government Notice of Motion in the contempt proceedings returnable on the very same day it was filed—despite the absence of any sworn reasons for urgency.

In each of these applications (Cravath's and the two by the Government) the moving party asserted that there was reason for speed and no opposing party objected—but none of those applications met the technical standard which the district court invoked on January 4, 1974, solely for the intervention application.

Thus, the district court, in order to vindicate its authority, has created one set of rules for the private litigants before it and ignored those rules for the Government. No judicial proceeding should hold the Government to a lesser standard than private litigants. Particularly is that so when the Government is prosecuting for contempt and where, as here:

> (i) the contempt sanction sought by the Government was unprecedented;
>
> (ii) the Government told the district court that its prior repeated representations that contempt was the appropriate way to seek appellate review of the Waiver Order, should not be "looked at or honored" (II App. B, at 15a); and
>
> (iii) the Government then opposed any appellate review of both the Contempt and Waiver Orders.

Contrary to the district court's criticism in its Memorandum, Cravath's intervention application followed the procedure suggested by this Court in *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), and utilized in *Hickman* v. *Taylor*, 329 U.S. 495 (1947): IBM and Cravath have sought, in good faith and on an appropriate ground, appellate review of the district court's Waiver of Privilege and Contempt Orders. IBM and Cravath are, we submit, now entitled to such review and this Court should grant it.

CONCLUSION

For the reasons stated, this Court should either defer consideration of this matter pending disposition by the district court of Cravath's new application to intervene or this Court should grant review now.

Dated: January 21, 1974

Respectfully submitted,

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APPENDIX A

United States District Court

Southern District of New York

69 Civ. 200 (DNE)

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

MEMORANDUM

EDELSTEIN, *Chief Judge:*

Cravath, Swaine & Moore (Cravath), attorneys representing defendant IBM, seeks to intervene in the above captioned action. The application for intervention pursuant to Fed.R.Civ.P. 24 is but another branch of the ever spreading tree of litigation emanating from this court's Pretrial Order No. 5.

The background and litigation history of Pretrial Order No. 5 was set out in this court's opinion of August 1, 1973, and, therefore, need not be repeated. *United States* v. *IBM*, 69 Civ. 200 (S.D.N.Y., Aug. 1, 1973). Nevertheless, some discussion of the circumstances leading up to the hearing held on July 16, 1973 pursuant to Local Civil Rule 14(b) is desirable.

On June 13, 1973 the United States Supreme Court issued an order refusing to stay Pretrial Order No. 5 and the mandate of the Court of Appeals. Thereafter, on June 25, 1973 this court, at the request of the United States, ordered IBM to show cause on June 28, 1973 why it should not be found in civil contempt for its continued refusal to comply with Pretrial Order No. 5. On the return date for the order to show cause the court heard argument on the question of contempt. At that time counsel for defendant requested that a hearing be held pursuant to Local Civil Rule 14(b), on the issue of IBM's contempt and the damage thereby occasioned.

By order dated July 3, 1973, the court scheduled a hearing pursuant to Local Civil Rule 14(b) for July 16. The hearing was "limited to the issues of the fine and damages to be assessed against defendant for its alleged contempt of this court's order, Pretrial Order No. 5 . . . ." Subsequently, defendant sought discovery from the Department of Justice with respect to the damages allegedly caused by its failure to comply with Pretrial Order No. 5. The Justice Department then moved for a protective order. After a hearing on July 10, the court granted plaintiff's motion for a protective order regarding IBM's noticed deposition of the Antitrust Division of the Department of Justice for July 11, and quashed a subpoena duces tecum also addressed to the Antitrust Division. Defendant, however, was "given leave to propound narrowly focused interrogatories and request for documents addressed specifically to the issue of damages to the United States occasioned by defendant's failure to comply with this court's Pretrial Order No. 5." Additionally, the court made it clear in the memorandum accompanying its order that if depositions became necessary, "then, on a proper application by IBM, such depositions will be permitted." In the same order the court severed the question of damages from the hearing scheduled for July 16, so that the discovery permitted by the court would not delay the hearing on the issue of a fine.

On July 16, 1973, the court conducted a hearing pursuant to Local Civil Rule 14(b), as limited by the orders of July 3 and July 10. On August 1, 1973, this court rendered its decision holding IBM in civil contempt and imposing a fine of $150,000 a day for its continued failure to comply with Pretrial Order No. 5.

Thereafter, IBM and Cravath sought appellate review of the contempt order in the United States Court of Appeals for the Second Circuit. The Court of Appeals stayed Pretrial Order No. 5 pending its determination of the appeal and application for an extraordinary writ.

On December 17, 1973, the Court of Appeals dismissed the appeal and denied the petition for mandamus. Additionally, the circuit court unequivocally stated that "Cravath's attempted intervention in the contempt proceeding is not properly before this court." *International Business Machines Corp.* v. *United States,* Nos. 73-2126-7, 73-2145-6 at 5639 (2d Cir., Dec. 17, 1973). Judge Oakes, writing for the majority, gave two rationales for this conclusion. First, contrary to the position asserted by appellants that this court implicitly denied the intervention motion, Judge Oakes found that "[t]he application for intervention was never determined by the court below, because the application was not filed until the morning of the hearing on July 16, 1973." *Id.*

Secondly, the appeals court concluded that "intervention questions like every other aspect of Government civil antitrust cases are reviewable only in the Supreme Court on direct appeal under the Expediting Act." *Id.* at 5639-640.

On December 18, 1973, this court received a letter from Simon H. Rifkind, Esq., a member of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys representing both IBM and Cravath, the applicant for intervention. The letter requested this court to set "a date and time for

a hearing on the intervention motion of Cravath, Swaine & Moore."

Although characterized as a "motion" by Mr. Rifkind, the intervention application was originally brought on by an order to show cause. The order to show cause was submitted to this court at 10:10 A.M. on the morning of July 16, 1973 and was made returnable at 11:00 A.M. that same day, the time at which the hearing under Local Civil Rule 14(b) was scheduled. When the hearing was convened, this court stated:

> At 10:10 this morning in my chambers I received a batch of papers. It should be clear that this recent application to intervene has not afforded the court an opportunity to review papers in the underlying documents. Accordingly, that application will not be heard now.

Transcript of July 16, 1973 at 2. The court is at a loss to understand why the application to intervene was submitted forty minutes before the requested return time. Cravath asserted before the court of appeals that its intervention application was timely because it was "forthwith filed" when it became apparent that the

> Government renounced its prior position and sought to block any appeal of Pretrial Order No. 5 by demanding devastating contempt sanctions against IBM, and resisting Cravath's application for a plainly appealable contempt order.
>
> When that unseemly reversal occurred, it became apparent—*for the first time* since Cravath began its journey to the appellate courts—that Cravath could not protect its own interests without intervening.

Memorandum on Behalf of Cravath, Swaine & Moore Concerning Denial of Its Motion to Intervene at 10, *International Business Machines Corp.* v. *United States,* Nos. 73-2126-7, 73-2145-6 (2d Cir., Dec. 17, 1973) (emphasis in original).

Even assuming *arguendo* that the Government's apparent change in position regarding a plainly appealable contempt order was the impetus for the application to intervene by Cravath, this does not explain why the application was submitted at the proverbial eleventh hour. IBM was served with this court's order to show cause why it should not be held in *civil* contempt for its failure to comply with Pretrial Order No. 5 on June 25, 1973. Consequently, Cravath had notice of plaintiff's intention to seek a *civil* contempt sanction against defendant at least twenty-days before the July 16 hearing. Moreover, viewing all the facts and circumstances surrounding the July 16 hearing most favorably to defendant, it was unequivocally clear as of July 10, when this court ordered the hearing scheduled for July 16 to go forward limited to the question of a coercive fine and severing the issue of damages so that IBM could obtain discovery, that this court was considering a civil sanction against defendant. Accordingly, it is difficult if not impossible to understand why Cravath failed to apply for intervention earlier.

Under Local General Rule 9(c)(2) motions must be served at least ten days prior to the return date. Had Cravath acted after being served on June 25, 1973 with this court's order to show cause, it would have had ample time to bring on its application for intervention by ordinary notice of motion. Even if it waited until July 10 to apply for intervention, it could have brought its intervention motion on by a procedurally appropriate order to show cause prior to July 16.

The court has never signed the order to show cause submitted on July 16. Local General Rule 9(c)(4) provides as follows: "No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary." Since the order to show cause why Cravath should not

be permitted to intervene as of right failed to comply with Local General Rule 9(c)(4), it will not be signed by the court.

Although the court agrees with the characterization of Judge Oakes that the intervention motion was merely a device "to permit the lawyers to be adjudged in token contempt to provide an appellate vehicle and thereby escape the thrust of *International Business Machines Corp. v. United States*, 480 F.2d *supra*." *International Business Machines Corp. v. United States*, Nos. 73-2126-7, 73-2145-6, at 5639 (2d Cir., Dec. 17, 1973), this view is not intended to prejudice the applicant's right to bring on a motion to intervene in proper form.

Dated: New York, New York
January 4, 1974.

David N. Edelstein

DAVID N. EDELSTEIN
Chief U.S.D.J.

SUPREME COURT, U.S.

No. 73-1065

FILED
APR 28
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA and
DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES DISTRICT COURT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (II IBM App.[1] I, pp. 158a-193a) and the district court's opinion (II

[1] References to "II IBM App." are to the Appendix filed by petitioner in Nos. 73-1064 and 73-1065. References to "IBM App." are to the Appendix filed by petitioner last June with the pending "all writs" application in No. 72-1661. See n. 2, *infra*.

IBM App. H, pp. 141a-157a) and Adjudication of Contempt (II IBM App. G, pp. 139a-140a) are not yet officially reported.

QUESTIONS PRESENTED

1. Whether, in an on-going government civil antitrust case, an adjudication that a corporation is in *civil* contempt because it failed to produce documents in violation of a pretrial order, is nevertheless *criminal* in nature because it imposes a contingent, coercive fine of five percent of the corporation's daily earnings for each day of continued non-compliance.

2. Whether, if the contempt adjudication is civil, it is a non-appealable interlocutory order.

3. Whether, if the contempt adjudication is civil, this Court has exclusive jurisdiction over any appeal from it under the Expediting Act, 15 U.S.C. 29.

STATUTES INVOLVED

Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, and Section 1291 of Title 28, 28 U.S.C. 1291, are set forth following page 33 of the petition.

STATEMENT

This petition seeks review of a judgment of the court of appeals that it lacked jurisdiction to review the district court's adjudication of civil contempt against International Business Machines Corporation

(IBM) for failure to comply with a pretrial discovery order in this government civil antitrust action.[2]

The discovery order, Pretrial Order No. 5, with which IBM has refused to comply, directs IBM to produce to the government certain documents which IBM had previously disclosed to a third party, Control Data Corporation (CDC), in the course of discovery in CDC's antitrust action against IBM in the United States District Court for the District of Minnesota. IBM claimed that the documents had been

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[2] The contempt order as well as the underlying pretrial discovery order are the subject of six separate appeals and petitions presently before this Court, including the instant petition for certiorari.

No. 72-1173 is a direct appeal by IBM to this Court from the pretrial discovery order.

No. 72-1661 is a petition by IBM to this Court for an extraordinary writ under 28 U.S.C. 1651(a), to review the discovery order.

In No. 72-1662, IBM has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (*en banc*). The court of appeals there held that it lacked jurisdiction to review, either by appeal or by mandamus, the pretrial discovery order.

In No. 73-1064, IBM seeks review on extraordinary writ of both the adjudication of contempt and the merits of the discovery order.

In No. 73-1066, Cravath, Swaine & Moore, counsel for IBM throughout the proceedings in this antitrust suit, has filed a direct appeal challenging the district court's rejection of its attempted intervention in the contempt proceedings against IBM.

IBM did not, within the time prescribed by 28 U.S.C. 2101(b), file a notice of direct appeal to this Court from the adjudication of contempt and therefore has not docketed an appeal therefrom under this Court's Rule 13.

inadvertently produced to CDC and were still protected from discovery by the corporate attorney-client and work-product privileges. In the instant case, the district court ruled, however, that IBM waived its claims of privilege by delivering the documents to CDC in CDC's suit, and ordered IBM to deliver those documents to the government in this case.

A. Pretrial Order No. 5

The history of the proceedings surrounding the entry of Pretrial Order No. 5 is fully set forth in the United States' Motion to Dismiss or Affirm filed in No. 72-1173 (see note 2, *supra*). During the initial stages of discovery in CDC's private antitrust action against IBM in Minnesota,[3] IBM turned over to CDC a large number of documents, which IBM had previously screened for privilege. CDC then selected out documents from those produced for microfilm reproduction. However, before they were microfilmed by CDC, IBM insisted that the selected documents be reviewed again for privilege by an IBM employee, a so-called "interceptor". In response to CDC's complaint regarding the slow pace of production, Judge Neville, on November 2, 1970, ordered IBM to remove the interceptor.[4]

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[3] CDC's action was filed in December 1968. Six other private treble damage actions against IBM were subsequently commenced and were consolidated, for pretrial discovery purposes, from time to time, with the *CDC* lawsuit in the district court in Minnesota.

[4] Judge Neville did not enter any order at that time declaring that IBM retained the right to claim that documents de-

The United States had filed the present action in the United States District Court for the Southern District of New York on January 17, 1969, not long after the CDC action began. The complaint charged IBM with attempted and actual monopolization of the market for general purpose digital computers, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. While discovery was going forward in the *CDC* case, the government and IBM sought ways to eliminate the heavy burden on IBM of massive and duplicative discovery. They ultimately agreed that the government would receive microfilms of the documents that had been turned over to CDC and select-

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livered to CDC were nevertheless privileged. He did indicate that, if he removed the interceptor, he might permit the parties to claim that documents produced were privileged, before they were introduced in evidence at trial or used in deposition proceedings. IBM's counsel has characterized Judge Neville's November 1970 ruling as follows: "*While the Court did not explicitly rule on whether inadvertent production would constitute a waiver*, the tone of what was said was that it would not" (IBM App. O, p. 117a, emphasis added).

Subsequently, on April 21, 1971, when the claim of privilege was again made to Judge Neville, he expressly ruled that IBM had in fact waived the privilege (IBM App. B, pp. 10a-11a).

One year later, on April 18, 1972, some eleven days after the government had moved in the court below for production of the documents previously delivered to CDC, Judge Neville ruled in the *CDC* case that his waiver ruling of April 1971 was erroneous. He stated that although his remarks of November 1970 "may not be crystal clear," he intended to rule that as to "each party the privilege as to any documents henceforth would not be deemed waived if reasonable effort of preinspection were to be made * * *" (IBM App. C, p. 16a).

ed by it for microfilming, from which IBM would excise allegedly privileged documents which it claimed to have disclosed inadvertently to CDC.

As government counsel began examining the material delivered by IBM, it became apparent that substantial quantities of material had been excised for privilege. On April 7, 1972, the government moved in the district court (Edelstein, Ch. J.) to compel production of approximately 1,200 allegedly privileged documents which had been produced by IBM to CDC in the Minnesota litigation, but which were excised from the microfilm delivered to the government. The matter was fully argued on May 12, 1972. IBM was represented by its present counsel Cravath, Swaine & Moore (Cravath). That firm did not attempt to intervene in its own behalf to assert its subsequently claimed (see pp. 10, 13-15, *infra*) work-product privilege.

The district court rejected IBM's claim of inadvertent waiver on September 12, 1972, and after further hearings, on September 26, 1972, entered Pretrial Order No. 5 directing production of the documents.[5] The order became final after further argument on October 5, 1972. IBM appealed to, and applied for extraordinary relief from, the court of appeals. That court stayed Pretrial Order No. 5. A divided panel held that it had jurisdiction to review the order, and directed that it be vacated. *International Business*

[5] A motion by the government for production of a further group of documents whose claimed privileged status has allegedly been waived is pending in the district court.

Machines Corp. v. *United States*, 471 F.2d 507 (IBM App. K). After rehearing *en banc*, however, the court (by a vote of 4 to 2), on May 8, 1973, held that it had no jurisdiction, either on appeal or by petition for a writ of mandamus, to review Pretrial Order No. 5. *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (IBM App. L). IBM petitioned for a writ of certiorari and for extraordinary writs, and also docketed a direct appeal from Pretrial Order No. 5 (see n. 2, *supra*).

B. The Contempt Proceedings in the District Court

On June 13, 1973, this Court denied IBM's application for a further stay of Pretrial Order No. 5. Prior to the initiation of any contempt proceedings the parties then advised each other and the district court of their positions, and of their views as to the appealability of any contempt sanctions.

By letter of June 15, 1973 (Appendix A, *infra*), a senior member of Cravath (Mr. Bromley) respectfully advised the trial court that he had possession of the documents, had concluded that IBM would be governed by its counsel's decision respecting them, and that he was not required by law to turn them over to the government. Citing *Hickman v. Taylor*, 329 U.S. 495, a criminal contempt case (see 153 F.2d 212, 214 (C.A. 3)), he requested that counsel be placed in contempt; he stated that this was "the only way to obtain appellate review" (App. A, *infra*, pp. 30-31).

On June 20, 1973, the government responded by letter (Appendix B, *infra*). It stated that in the

event of continued defiance of the court's order by IBM, the most appropriate sanction would be an order holding the defendant, IBM, in civil contempt. IBM, rather than any individual, was the appropriate respondent because the conduct in issue was that of the corporation through its agents. The government recommended a contingent and coercive civil sanction equal to five percent of IBM's daily earnings for each day of continued non-compliance beyond the stated time for delivery of the documents. The government also indicated that it was open to the court to find IBM in criminal contempt. The government's letter, citing *Fox* v. *Capital Co.*, 299 U.S. 105, also advised, contrary to a statement in the government's expedited opposition to IBM's motion for a stay in this Court, that there is a distinction, not previously adverted to by the parties, between the appealability of civil and criminal contempt proceedings, but that the question of appealability should not "enter into this Court's determination of an appropriate sanction. Rather * * * the sanction should turn on the policies of law to be vindicated" (App. B, *infra*, p. 38).

On June 25, 1973, on a petition by the United States under Local Rule 14 governing civil contempt (II IBM App. J), the district court issued an order directing IBM to show cause at a hearing on June 28, 1973, why it should not be found in civil contempt (II IBM App. A). At the hearing on June 28, 1973, Mr. Rifkind, counsel for IBM and Cravath, stated that in order to provide a vehicle for appeal of

Pretrial Order No. 5 the court should, instead of finding IBM guilty of contempt, find its counsel, Mr. Bromley of Cravath, guilty of a civil contempt and impose a token penalty (II IBM App. B, p. 29a).[6] He emphasized that the contempt was "not a contumacious one" but was intended to provide a vehicle for review (*id.* at 30a). IBM also filed a response to the order to show cause indicating that if its proposal was unacceptable, "then Cravath, and IBM, pursuant to [Local Rule 14], would and hereby do put in issue their 'alleged misconduct' and 'the damages thereby occasioned'."

In the light of IBM's admitted non-compliance and request for a hearing under Local Rule 14, the district court on July 3, 1973, entered an order providing for a hearing "limited to the issues of the fine and damages to be assessed against defendant for its alleged contempt of this court's order, Pretrial Order No. 5." The district court noted that IBM had not complied with the terms of Pretrial Order No. 5 and that on the return date of the order to show cause, June 28, 1973, IBM had not controverted the facts alleged in the government's motion papers. The hearing was set for July 16, 1973 (II IBM App. C).[7]

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[6] With respect to the token penalty, Mr. Rifkind stated:

> "I suggest $100 because the question can be resolved in the Appellate Courts just as well with a $100 fine as with a million dollar fine. Impose a penalty of $100 a day until he purges himself of the contempt and make the penalty not applicable pending appeal and its diligent prosecution" [II IBM App. B, p. 29a].

[7] On July 10, 1973, this order was modified by adjourning the question of damages claimed by the government to result

C. The Contempt Hearing

On July 11, 1973, IBM filed a notice that on July 16, 1973, it would present a "Motion for Entry of a Plainly Appealable Contempt Order if an Order of Contempt is to be Made" (II IBM App. K). One hour before the opening of the hearing on July 16, 1973, Cravath attempted to intervene as of right on its own behalf in the contempt proceeding (II IBM App. L). The district court ruled, however, that since it had not had an opportunity to review the intervention request, that application would not be heard (II IBM App. F, p. 103a). The court then proceeded to hear first the government's claim of civil contempt, and thereafter IBM's motion for entry of an immediately appealable order.

IBM's counsel (Mr. Rifkind), in his opening statement, declared that neither IBM nor its attorneys were defiant of the lawful orders of the court. If the court was willing to enter an appealable contempt order, then IBM would forego trial on the civil contempt allegation. If the court was not disposed to accept this condition, then IBM and its attorneys insisted upon a trial on "everything", including whether Pretrial Order No. 5 was a lawful order (II IBM App. F, pp. 115a-116a). IBM's counsel expressly conceded on the record, however, that IBM had not com-

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from the alleged contempt, pending completion of discovery on the damage issue. The hearing previously ordered, with this modification, was otherwise to go forward on the scheduled date, July 16, 1973 (II IBM App. E).

plied with Pretrial Order No. 5 (II IBM App. F, p. 131a).[8]

The government introduced, as an exhibit bearing on the amount of the coercive fine necessary, IBM's Annual Report and portions of an affidavit explaining, on the basis of that report, IBM's annual revenues and earnings. On IBM's objection, the trial court excluded documents which the government claimed demonstrated the delay in its discovery program resulting from noncompliance with Pretrial Order No. 5. The court agreed with IBM's counsel that this issue was relevant to the postponed damage question (see n. 7, *supra*), not the issue being heard (II IBM App. F, pp. 121a-129a).

D. The District Court's Decision

On August 1, 1973, the district court entered an opinion, findings of fact and conclusions of law, and an order adjudicating IBM in civil contempt (II IBM App. G, H). It imposed a contingent and coercive fine of $150,000 per day, to begin running from August 3, 1973, for each day of continued noncompliance with Pretrial Order No. 5. The court's opinion carefully reviewed the history of the proceedings. It held that there were no issues of fact to be tried concerning IBM's alleged misconduct because IBM

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[8] In its memorandum of July 11, 1973, IBM disputed the court's finding in its July 3rd order that "defendant did not controvert the facts alleged in plaintiff's motion papers." However, it conceded that the "only uncontroverted fact of significance was that IBM's attorneys had not produced some of the documents covered by Pretrial Order No. 5 to the Department" (Memorandum for IBM and its Attorneys filed July 11, 1973, p. 5).

had admitted all the facts necessary for a determination of the fact of contempt. Nowhere had IBM denied that it had failed to comply with Pretrial Order No. 5, that that order was in full force and effect, and that IBM had the power to comply with it.

The court then reviewed the authorities governing civil and criminal contempt. It held that sanctions should be imposed solely to coerce the defendant to do what it had refused to do, and should be contingent in nature. It concluded that, under *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418, and subsequent authorities, such a remedial sanction, which provides an opportunity to the contemnor to purge itself by compliance, is civil in nature.

As to IBM's contention that the sanction should run against Cravath in order to provide an immediate vehicle for interlocutory appeal, the court ruled that appealability was not a proper consideration for it. It was limited to framing "an order which it believes to be proper in the circumstances of the case before it" (II IBM App. H, p. 148a). Pretrial Order No. 5 runs against IBM, not its counsel, and counsel's possession of the documents in issue, the court held, cannot absolve the corporation of its duty.

Finally, from IBM's Annual Report, the court found that the corporation's net earnings for 1972 exceeded $1.2 billion and that its stockholders' equity amounted to $7.5 billion. The court concluded, therefore, that the minimum amount sufficient to compel a firm of such strength and resources to comply was $150,000 per day (II IBM App. H, p. 150a).

E. The Decision of the Court of Appeals

IBM sought review of the adjudication of contempt and the imposition of the fine, both on appeal and by extraordinary writ, in the court of appeals. Additionally, Cravath and IBM filed an appeal under 28 U.S.C. 1291 asserting that the district court had erroneously denied Cravath's petition to intervene in its own behalf as a party in the civil contempt hearing, for the purpose of asserting an attorney's work-product privilege against production of some of the documents. They prayed that the district court be required to impose civil contempt sanctions upon Cravath or one of its members, Mr. Bromley, to provide appellate review of the underlying Pretrial Order No. 5. The court of appeals stayed the contempt order pending its review.

On December 17, 1973, a divided panel of the court of appeals issued an opinion dismissing the appeals and denying the petition for an extraordinary writ (II IBM App. I). The court held that the contempt order was civil in character, not criminal as IBM had contended; that orders of civil contempt are interlocutory and may not be challenged on appeal until the entry of final judgment under *Fox* v. *Capital Co.*, 299 U.S. 105, 107, and *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 608; and that even if the order were considered final for purposes of review, the Expediting Act, 15 U.S.C. 29, deprives the courts of appeals of jurisdiction to review such an order in a government civil antitrust action. The court of appeals also rejected IBM's contentions that the gov-

ernment was estopped from arguing nonappealability of the contempt order [9] and that manifest errors in the proceedings in the district court require the contempt order to be vacated. Finally, the court held that the question of Cravath's attempted intervention in the contempt proceedings was not properly before it, in that the district court had never acted upon the untimely filed application to intervene.

In a dissenting opinion (II IBM App. I, pp. 173a-193a), Judge Timbers expressed the view that the contempt adjudication was criminal in nature and therefore reviewable by the court of appeals. He would have set aside the contempt order, vacated the production order, and remanded the case to the district court for a ruling on the merits of IBM's underlying claims of privilege. In addition, he viewed the question of Cravath's attempted intervention as properly before the court and concluded that Cravath had been erroneously excluded from participation in the contempt proceedings.

The court of appeals subsequently stayed issuance of its mandate, pursuant to Rule 41(b), Fed. R. App. P., pending disposition of the present petition for certiorari by this Court.

Meanwhile, on January 4, 1974, the district court entered an opinion denying without prejudice Crav-

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[9] IBM alleged that the government had attempted to mislead IBM by previous statements that the only way to obtain review of Pretrial Order No. 5 before the end of the case was for IBM or its representative to risk contempt.

ath's motion to intervene, for failure to comply with local rules (Supp. Memorandum for Cravath and IBM, App. A). On January 21, 1974, Cravath moved to intervene as of right, *nunc pro tunc*, and IBM moved to vacate the adjudication of contempt. Both motions were denied by Judge Edelstein in an opinion entered March 6, 1974 (Supp. J. S., No. 73-1066, App. A).

ARGUMENT

The history of Pre-trial Order No. 5 demonstrates why the rule against interlocutory appeals in government antitrust cases is sound and why the discovery in the present important and complex action should not be further delayed. The contempt order was civil, not criminal. It is therefore not final for purposes of review. *Fox* v. *Capital Co.*, 299 U.S. 105. Even if the rule of *Fox* were to be reconsidered this could be done only on a direct appeal of the contempt adjudication [10] to this Court under the Expediting Act, 15 U.S.C. 29, because this is a government civil antitrust suit. IBM's time for notice of such an appeal has long expired.[11] The decision of the court of appeals was correct and presents no issue warranting review by this Court.

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[10] Cf. *United States* v. *Procter & Gamble*, 356 U.S. 677, 680.

[11] IBM timely filed and docketed a direct appeal from Pretrial Order No. 5, see n. 2, *supra*.

1. The district court's contempt adjudication was civil, not criminal in nature. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both" (*Bloom* v. *Illinois*, 391 U.S. 194, 201) standing apart from the underlying litigation in which the order disobeyed was entered. It is governed by 18 U.S.C. 401 and 402 and Rule 42, Fed. R. Crim.P. The requirements of notice, burden of proof, penalty, and the right to jury trial are characteristic of criminal proceedings. *Bloom* v. *Illinois*, *supra*, 391 U.S. at 205. The penalty imposed is public rather than private, since it is intended to "vindicate" the authority of the court by punishing for completed acts of misconduct with a fixed and certain penalty. See, *e.g.*, *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *Ross*, 243 F. Supp. 496 (S.D.N.Y.). See, also, Dobbs, *Contempt of Court: a Survey*, 56 Cornell L. Rev. 183, 235-245 (1971).

Civil contempt, on the other hand, is intended, not to punish for completed acts of contumacy, but to compel obedience to court orders. The defendant's intent is irrelevant (*McComb*, *supra*, 336 U.S. at 191), and the court's power to enforce compliance is inherent rather than dependent on statute or rule (*Shillitani* v. *United States*, 384 U.S. 364, 370). As the court of appeals observed (II IBM App. I, p. 163a):

> The hallmark of civil contempt is that the sanction imposed is only contingent and coercive. *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); *Penfield Co.* v. *SEC*, 330 U.S. 585, 590 (1947); *United States* v. *UMW*, 330 U.S. at 303; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 442. See *Dobbs*, 56 Cornell L. Rev. at 237. Civil contempt, moreover, has a remedial purpose—compelling obedience to an order of the court for the purpose of enforcing the other party's rights, or obtaining other relief for the opposing party. *Nye* v. *United States*, 313 U.S. 33, 42 (1941); *McCrone* v. *United States*, 307 U.S. 61, 64 (1939); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 441. The distinction between civil and criminal contempt is, in short, "usually based on the purpose for which the contempt sentence is meted out." *Dobbs*, 56 Cornell L. Rev. at 235.

The contingent and coercive civil purpose of the adjudication here is plain from the proceedings. The district court's order to show cause specifically stated that the matter in issue was whether IBM should be adjudicated in civil contempt of Pretrial Order No. 5 (II IBM App. A, p. 1a). The proceedings have been conducted under Local Rule 14, which governs civil contempt proceedings, including cases arising from disobedience of discovery orders.[12] IBM made no request for a jury trial. The government did not seek imposition of a definitive punitive sanction and it litigated the claim of civil contempt in its capacity

[12] Both the government, in its petition, and IBM had requested the court to proceed under Rule 14.

as plaintiff in a civil antitrust suit, not as criminal prosecutor under 18 U.S.C. 401. As stated by the court of appeals (II IBM App. I, p. 163a):

> The order, dated August 1, 1973, makes it clear that the fine is for each day that IBM "fails to comply with Pretrial Order No. 5" and that IBM is "entitled to purge itself of this contempt at any time" by compliance with the discovery order. The order of July 10, 1973, requiring that the hearing proceed in respect to the possibility of contempt, clearly states that the hearing is to be "on the issue of a coercive fine. . . ." Thus the order was both coercive and contingent, indicating a civil rather than criminal contempt.

IBM's present argument (Pet. 16), that the severity of the penalty imposed—a contingent fine of $150,000 per day—indicates that the contempt order is criminal rather than civil, was considered and properly rejected by the court below. While the fine appears large in absolute terms, it represents less than 5 percent of IBM's daily earnings.[13] The court of appeals properly recognized that the magnitude of the fine imposed cannot "turn a civil contempt into a criminal one, any more than the sending of an individual to jail turns a civil contempt into criminal contempt. In neither case does the severity of the penalty change the nature of the contempt" (II IBM App. I, p. 164a, citations omitted).

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[13] As the court of appeals noted, "the same percentage of earnings fine against one with a salary of $50,000 would be less than $7 per day" (II IBM App. I, p. 164a, n. 2).

The court of appeals also properly rejected IBM's claim (Pet. 16-18) that the district court's failure explicitly to weigh "the character and magnitude of the harm threatened by continued contumacy * * *" (*United States* v. *United Mine Workers*, 330 U.S. 258, 304) compels a finding of criminal contempt. IBM itself objected to the government's offer of evidence concerning the harm to it from IBM's continued refusal to comply with Pretrial Order No. 5 and this objection was sustained (II IBM App. F, pp. 123a-129a). "Thus, even if IBM had a right to consideration by the court of the harm to the Government, it waived that right by objecting to the evidence of it" (II IBM App. I, pp. 164a-165a).

Second, even if the language of *United Mine Workers* were read to require an explicit finding as to harm in all coercive, civil contempts, the failure to make such a finding would not convert a contempt order—which is styled as civil by the judge imposing it, which has a clearly civil purpose, and which was imposed only after consideration of questions relevant only to civil contempt—into an order of criminal contempt. Such failure "at worst would only go to the amount of the coercive fine, not to the merits of the civil contempt itself" (II IBM App. I, p. 166a).[14]

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[14] The court of appeals observed further, "In light of IBM's often stated intention that it will comply with a definitive ruling on the Pretrial Order, rather than stand in contempt, no matter how nominal the fine, there would be little point in delaying the process by remanding for reconsideration of the amount of the fine" (II IBM App. I, p. 166a).

Finally, the court of appeals correctly held that the language of *United Mine Workers* does not impose an inflexible requirement that a court must consider the harm of continued contempt in fashioning a civil, coercive contempt order. IBM has cited no case where a civil coercive contempt was voided for failure to meet this "requirement",[15] nor do civil coercive contempts always involve such findings. See, *e.g.*, *National Labor Relations Board* v. *Teamsters Local 282*, 438 F. 2d 100 (C.A. 2); *National Labor Relations Board* v. *Teamsters Local 676*, 450 F. 2d 413 (C.A. 3); *National Labor Relations Board* v. *Lynair, Inc.*, 380 F. 2d 286 (C.A. 6).[16] In the circumstances of the present case, it would be "impossible to determine what harm is being suffered here by failure to provide this material for discovery" and to attempt to do so "would involve a prejudgment of the case on the merits" (II IBM App. I, p. 166a). Obviously,

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[15] The cases cited by IBM (Pet. 18, n. *) supporting the need for an inquiry into harm all relate to compensatory fines, not coercive fines. See *Boylan* v. *Detrio*, 187 F. 2d 375 (C.A. 5); *United States* v. *Aberbach*, 165 F. 2d 713 (C.A. 2); *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774 (C.A. 2); *McKee Glass Co.* v. *H.C. Fry Glass Co.*, 248 Fed. 125 (C.A. 3).

[16] It is difficult to see how the presence or absence of an explicit finding with respect to "the character and magnitude of the harm threatned by continued contumacy" would have any effect on the traditional sanction for civil coercive contempt of imprisonment of an individual for each day of continued noncompliance. Once it is determined that imprisonment is required to bring about compliance, the magnitude of threatened harm becomes irrelevant.

the government cannot conduct a mini-trial on the merits of its monopolization charge in order to achieve compliance with a pretrial discovery order. As the court of appeals held, *United Mine Workers* requires only that (*ibid.*):

> the coercive fine be reasonably set in relation to the facts, that it not be arbitrary. Judge Edelstein's memorandum [II IBM App. H] is evidence that his decision was reasoned and that he gave consideration to the various factors which led to this particular fine—the ability of IBM to meet these payments without undue hardship and the imposition of a fine stiff enough to bring about expeditious compliance.

2. Since the contempt sanction is civil, in the circumstances of this case the adjudication is an interlocutory order which, under this Court's decisions, may not be challenged on appeal until the entry of final judgment. In *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, the defendants in a civil action refused to obey an order to produce books and records. The trial court held them in civil contempt by imposing a contingent fine and jail sentence of 60 days if they failed to produce by a specified date. This Court held that this sanction was civil and interlocutory, and that the circuit courts of appeals therefore had no statutory jurisdiction to review it in advance of the final decree in the case in which the order was made.

Subsequently, in *Fox* v. *Capital Co.*, 299 U.S. 105, 107, the Court stated that the "rule is settled in this Court that except in connection with an appeal from

a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." *Fox* involved civil contempts of orders entered in a supplementary proceeding under the New York Civil Practice Act, "a summary substitute for a suit in equity by a creditor for the discovery of assets" (*ibid.*). This Court concluded that such a supplementary proceeding may continue until its aim has been achieved or it expires. It held that the civil contempt sanctions, which included a fine and imprisonment until payment of the fine, were not final and were, therefore, not appealable.[17]

IBM argues (Pet. 19-25) that the principle of *Fox* v. *Capital Co.* is not applicable in the present case, citing *Reisman* v. *Caplin*, 375 U.S. 440; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1; and *New York Telephone*

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[17] The principle of *Fox* and *London Guarantee* remains in full force. It has never been modified by any statute conferring jurisdiction over adjudications of civil contempt and continues to be followed in decisions of the courts of appeals. See, *e.g.*, *Vincent* v. *Teamsters Local 294*, 424 F. 2d 124, 127-128 (C.A. 2); *Dickinson* v. *Rinke*, 132 F. 2d 884, 885 (C.A. 2); *Hughes* v. *Sharp*, 476 F. 2d 975 (C.A. 9); *Hodgson* v. *Mahoney*, 460 F. 2d 326, 327 (C.A. 1), certiorari denied, 409 U.S. 1039; *Securities and Exchange Commission* v. *Naftalin*, 460 F. 2d 471, 475 (C.A. 8); *Fireman's Fund Ins. Co.* v. *Myers*, 439 F. 2d 834, 838 (C.A. 3); *Southern Railway Co.* v. *Lanham*, 403 F. 2d 119, 124 (C.A. 5).

IBM's present argument (Pet. 12-14, 24) that the principle of *Fox* is limited by the facts of that case ignores the fact that the rationale of *Fox* was based squarely on *London Guarantee*, which involved factual circumstances almost identical to those present here.

Co. v. *Communications Workers*, 445 F. 2d 39 (C.A. 2). *Reisman*, however, did not involve an interlocutory adjudication of contempt at all. As the court of appeals observed (II IBM App. I, pp. 167a-168a, footnotes omitted):

> *Reisman* v. [*Caplin*], *supra*, is simply not applicable to this case. There the claim was that the IRS's summons machinery should be enjoined as to plaintiff because the summons sought material which incriminated him and also unlawfully appropriated the attorney's work product. The Supreme Court denied the injunction, because there was already adequate judicial review of the IRS's summons in a contempt proceeding, which was the only means to enforce the summons. Indeed, *Reisman* is contrary to IBM's case, because it stands for the adequacy of the judicial review in a contempt proceeding itself. In passing, the Court noted that a finding of civil or criminal contempt enforcing the summons would be appealable. This is so * * * because it would not be interlocutory. It would be the final order of the only proceeding before the court, which is certainly not the case here.

In *Sibbach* v. *Wilson & Co.*, without reference to the rule in *Fox* v. *Capital Co.*, this Court reviewed on petition for writ of certiorari a court of appeals decision affirming an adjudication of civil contempt for refusal by the plaintiff in a tort action to submit to a physical examination. The issue of the appealability of a civil contempt order was never raised. There is no indication that the Court intended to modify or overrule *Fox*, and *Fox* was subsequently

cited in *Penfield Co. of California* v. *Securities and Exchange Commission*, 330 U.S. 585, 590. And Mr. Justice Rutledge's dissenting opinion in *United States* v. *United Mine Workers*, 330 U.S. 258, quoted *Fox* as defining the "largest present difference" between appeals in civil and criminal contempts. 330 U.S. at 369 n. 35.[18] That difference remained unmodified by the 1948 revision of the Judicial Code.

The rule of *London Guarantee* and *Fox* v. *Capital Co.* is not an arid procedural technicality. It rests upon the unchanged policy of Congress to limit interlocutory appeals in civil cases to specifically defined categories. Particularly inappropriate for interlocutory appeals are discovery orders at the pretrial stages of litigation. The arguments urged here by

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[18] The Second Circuit's decision in *New York Telephone Co.* v. *Communications Workers, supra*, is also inapplicable. That case arose out of alleged disobedience by a labor union of a temporary restraining order against a particular work stoppage. The order was extended over a period long after the initial dispute was over, and the union was subsequently adjudged in civil contempt. On a challenge to the union's appeal for lack of finality, the court of appeals concluded that the main action in which the order had been issued had effectively been terminated and therefore that the civil contempt adjudication being appealed was no longer interlocutory. The court stated: "* * * we doubt that anything further remains of the main action unless the district court grants leave to replead. Accordingly, our intervention by way of appeal runs no risk of disrupting the orderly course of proceedings below." 445 F. 2d at 45. That is not the case here, since the main action remains far from final adjudication and is being delayed by petitioner's noncompliance with the trial court's discovery order.

IBM to undercut the *Fox* principle, however, would result in a right of appeal for *all* pretrial discovery orders. As the court below concluded: "* * * the possibility of abuse and injustice would actually be increased by opening wide the gates of review to discovery orders, than by leaving the determination to the wise discretion of experienced trial judges" (II IBM App. I, p. 170a, footnote omitted). The numerous, complex, and time-consuming proceedings, arising out of a discovery order entered more than one year earlier, demonstrate the reasons for the requirement that only final judgments are appealable in a government antitrust case. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151.[19]

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[19] IBM complains of the government's "change of position" concerning the appealability of a civil contempt adjudication. Government appellate counsel erroneously overlooked *Fox* v. *Capital* and *Doyle* v. *London Guarantee*, *supra*, in arguing that "contempt" would be appealable to this Court. These cases should have been cited by the government in the earlier proceedings, and in opposition to IBM's application to this Court for a stay of Pretrial Order No. 5, because they reinforce the government's unchanged contention that under the rule of finality, pretrial discovery orders are not appealable until final judgment.

Judge Mulligan in fact cited *Fox* v. *Capital* in his dissent from the panel decision later vacated by the court of appeals *en banc* (IBM App. K, p. 60a, n. 3). Moreover, before any contempt proceedings were filed, IBM was given further notice of these cases by the government's letter to the district court of June 20, 1973. (See Statement, *supra*, pp. 7-8.) In addition, as the court of appeals observed (II IBM App. I, pp. 170a-171a): "appellate jurisdiction cannot be conferred on a court of appeals by consent, *Stratton* v. *St. Louis South-*

3. Even if it were assumed that the rules of *Fox* v. *Capital* and *Doyle* v. *London Guarantee* might be reconsidered, the court of appeals properly held that it did not have jurisdiction to do so. Jurisdiction over any appealable orders and extraordinary applications under 28 U.S.C. 1651(a) in this government civil antitrust case lies, if at all, only in this Court under the Expediting Act, 15 U.S.C. 29. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151. Moreover, since IBM has not appealed to this Court from the adjudication of civil contempt, no occasion is presented for this Court to reconsider the finality rule as applied to contempts in Expediting Act cases.

In *Tidewater* this Court held that "Congress enacted § 2 of the Expediting Act in 1903 to withdraw *all* intermediate appellate jurisdiction in Government civil antitrust cases" (409 U.S. at 154-155, emphasis by the Court). And, quoting from *United States* v. *California Cooperative Canneries* (279 U.S. 553, 558), the Court reaffirmed that "* * * *Congress limited the right of review to an appeal from the decree which disposed of all matters* * * *; and it precluded the possibility of an appeal to either* [*this Court or the court of appeals*] *from an interlocutory decree*" (409 U.S. at 160, emphasis by the Court). Thus under the Expediting Act appeal lies only to this Court, and then only after final judgment is entered. The same principle also applies with respect to pro-

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western Railway Co., 282 U.S. 10, 18 (1930), or by waiver, *United States* v. *Griffin*, 303 U.S. 226, 229." See *NAACP* v. *New York*, 413 U.S. 345, 353.

ceedings for civil contempt. *Terminal Railroad Association* v. *United States*, 266 U.S. 17; *United States* v. *American Society of Composers, Authors & Publishers*, 341 F. 2d 1003, 1007 (C.A. 2).[20]

IBM now argues, without citation of authority, that the present dispute involving the adjudication of contempt is "separate, different and distinct from the relief sought in the Government's antitrust case" and therefore the Expediting Act does not apply (Pet. 26). While a recognized exception to the Expediting Act does exist with respect to disputes arising out of government antitrust proceedings which have become essentially conflicts between private parties which are ancillary to the government's affirmative claims, and "outside the mainstream of the litigation in which the Government is directly concerned,"[21] the present controversy is obviously not of this character. First, the dispute is directly between IBM and the government, not private parties. Second, the process of discovery out of which the pretrial order and the resulting contempt order arose is essential to the ultimate trial of this action and is thus clearly with-

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[20] See also *First Security Nat. Bank and Trust Co. of Lexington* v. *United States*, 382 U.S. 34, in which this Court reversed, on direct appeal, a civil contempt judgment against a defendant in a government antitrust case entered *after* the judgment in the main action became final.

[21] *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39, 40; *United States* v. *Navajo Freight Lines, Inc.*, 339 F. Supp. 554, dismissed *sub nom. Garrett Freightlines, Inc.* v. *United States*, 405 U.S. 1035; *United States* v. *American Society of Composers, Authors and Publishers*, 341 F. 2d 1003, 1007 (C.A. 2).

in the "mainstream" of the government's litigation. Third, discovery of relevant documents goes to the heart of the government's antitrust case. Thus, there is no basis for an exception here from the explicit language in *Tidewater* with respect to the foreclosure of court of appeals jurisdiction in Expediting Act cases, and with respect to the rule of finality in such cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

THOMAS E. KAUPER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
JOHN B. WYSS,
Attorneys.

* In place of the Solicitor General, who is disqualified in this case.

APPENDIX A

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June 15, 1973

U. S. v. *IBM*

Dear Judge Edelstein:

Pursuant to my request yesterday afternoon Your Honor has set June 20, 1973, at 11:00 a.m., as the date for hearing my position with respect to the documents covered by Pretrial Order No. 5, and has asked me to put that position in writing no later than by the close of Monday, June 18. I want to convey my position to you just as quickly as possible and set it forth herewith.

The documents as to which a claim of attorney-client privilege was made and which are covered by Your Honor's Order are in my possession. I have, most respectfully, come to the conclusion that I am not required by the law to deliver the documents to the Government and should not do so. However, I am of course willing to have the documents reviewed pursuant to Special Master Order No. 1 to determine whether the documents contain matter protected by privilege.

Under the logic of Your Honor's ruling, should we deliver such documents to Government counsel such action might itself constitute a waiver of the privilege as well as render moot our present efforts in the Supreme Court to seek appellate review of that ruling. Even if Your Honor were to enter an order that such delivery would not itself constitute a waiver, we would not thereby be assured of protection in other courts. The District Court in St. Paul ordered such protection in the *Control Data* case but Your Honor's ruling has, in effect, rendered that protective provision null and void. Accordingly, under that reasoning (which we, of course, are contending was erroneous), IBM might not be protected in another case against a claim that delivery under Pretrial Order No. 5 was a waiver. Indeed, our knowledge of Your Honor's viewpoint could be interpreted as acquiescence, and therefore waiver, should we in compliance with your order deliver the documents to the Government.

The Government has suggested both in the Second Circuit and in its opposition to a stay in the Supreme Court that the only way to obtain appellate review is for a contempt citation to be entered. As you know we have sought to obtain appellate review on the merits by every other available means, and now have appellate proceedings pending in the Supreme Court. However, in some cases, as in the landmark case of *Hickman* v. *Taylor*, the only way to obtain appellate review is for counsel challenging the lawfulness of the order, with deference, to be placed in contempt

of court. And thus, most respectfully, I solicit your cooperation in issuing a contempt citation which will facilitate review of the Order.

Because of the importance of the attorney-client privilege to the administration of justice, the risk of irreparably depriving IBM of its claim of privilege and the risk of infecting other cases, I have respectfully concluded that I should not produce the documents unless and until it has been finally determined that they should be produced.

Respectfully,

/s/ Bruce Bromley
BRUCE BROMLEY

The Honorable David N. Edelstein,
Chief Judge,
United States District Court,
Southern District of New York,
United States Courthouse,
Foley Square,
New York, N. Y. 10007

K

Copy to Raymond M. Carlson, Esq.
Antitrust Division,
Department of Justice,
Washington, D. C. 20530

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 20530

[Seal]

June 20, 1973

Address Reply to the
Division Indicated
and Refer to Initials and Number

TEK:BBW:RMC
60-235-38

Honorable David N. Edelstein
Chief Judge
United States District Court
Southern District of New York
New York, New York 10007

Re: United States v. International Business Machines Corporation, 69 Civ. 200

Dear Judge Edelstein:

On September 26, 1972, ruling upon the government's motion filed April 7, 1972, this Court entered Pretrial Order No. 5, directing defendant to produce for inspection and copying by the government certain documents heretofore produced to Control Data Corporation during the course of private litigation between that corporation and defendant. Attempts by defendant to secure reversal of this Court's order resulted in the entry of a number of stays of the order,

but on June 13, 1973, the Supreme Court denied defendant's most recent request for a further stay of this Court's order.

Counsel for defendant now assert, in their letter to this Court of June 15, 1973, that they are ". . . not required by law to deliver the documents to the government and should not do so . . . .".

This position is in direct contradiction to the provision of Pretrial Order No. 5, which orders that defendant "immediately deliver to plaintiff" the documents subject to the order. Defendant is thus in direct and deliberate defiance of this Court's order. Such conduct may result in yet another delay in the government's preparation of this case for trial.

On behalf of the public interest in the expeditious resolution of the issues presented by this case, the government urges that this Court direct immediate compliance with Pretrial Order No. 5 and further direct that the defendant deliver or cause to be delivered the documents subject to that order to the government's representatives by 12 o'clock Noon on Friday, June 29, 1973.

The Court has also requested that the government state its position in the event defendant continues to defy this Court's order. The sanctions available in this situation are set forth in the Federal Rules of Civil Procedure 37(d)(2).

Under subparts (A) and (B) of this Rule, the Court may order that the matters regarding which its order was made or any other designated facts be taken as established for the purposes of the action

or may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses. However, inasmuch as the government has seen only one of these documents, the government presently has no basis upon which to recommend sanctions of this nature.

Under subpart (C) the Court may make an order striking out pleadings or parts thereof or rendering a judgment by default against the disobedient party. For the reasons set forth above, the government does not believe that an appropriate sanction presently can be recommended by it to strike parts of defendant's pleadings. And although the rendering of a default judgment has been held in this circuit to be an appropriate sanction in comparable circumstances, *cf. Trans World Airlines* v. *Hughes Tool Co.*, 449 F. 2d 51 (1971), *reversed on other grounds*, 409 U.S. 363 (1973), the magnitude of the public interest and other interests such as those of employees and stockholders which would be affected by such action here render the use of this sanction questionable without a determination on the merits of the government's charges of monopolization. The government does note, however, that a default judgment on the issue of liability would not preclude full proceedings upon the propriety of the relief prayed for in the government's memorandum of October 16, 1972.

Subpart (D) of Rule 37(b)(2) provides that, in lieu of making any of the foregoing orders or in addition thereto, the court may make an order treating as a contempt of court the failure to obey an

order directing discovery. In the government's view, an order holding defendant to be either in civil contempt or simultaneously in civil and criminal contempt would be appropriate sanctions in the present circumstances.

An order holding defendant to be in civil contempt would, in the government's view, expedite this litigation, now long delayed by defendant's refusal to produce the documents, and carry out the purposes of the federal discovery rules and the philosophy which underlies the Expediting Act, 15 U.S.C. § 28. Indeed, Section 4 of the Sherman Act, 15 U.S.C. § 4 directs the court before which any antitrust action is pending to ". . . proceed, as soon as may be, to the hearing and determination of the case . . . ." The coercive conditional sanction which attaches to a finding of civil contempt seems to the government to be the most likely route to an orderly and expeditious resolution of this matter.

We point out, moreover, that the conduct of defendant on the question of compliance with Pretrial Order No. 5 has been made well known to the Court; it has been open and defendant's intentions have been disclosed both to the government and to the Court in the letter of defendant's counsel to the Court dated June 15, 1973. While these reasons, the government believes, may militate against holding defendant in criminal contempt at this time, defendant's proposed conduct would be deliberate and willful, thereby rendering the sanction of criminal contempt appropriate.

With respect to sanctions for civil contempt, the government urges that, if defendant persists in its

defiance of this Court's order beyond the stated time for delivery of the documents, this Court should impose upon defendant a civil sanction, conditional in nature, requiring that defendant pay into the general treasury of the United States an amount equal to 5 percent of its daily earnings, based upon its 1972 net earnings, each day to be measured from midnight to midnight, provided that delivery of the documents as aforesaid before the close of business on any day shall effect a remission of the sanction for that day. In addition, this civil sanction should continue in effect until the documents are delivered to plaintiff or until the case is finally terminated and all appeals have been completed or the time for appeal has expired, whichever is sooner.

With respect to sanctions for criminal contempt should the Court elect to so proceed, the government is of the view that an appropriate fine to be imposed upon defendant would be $1 million.

The civil sanction described above is deemed the very minimum, considering the size and resources of the defendant to effect the prompt delivery of these documents, compliance with this Court's order and vindication of this Court's authority to issue and enforce such orders in this major antitrust case. The payment to the genreal treasury will compensate the public interest, at least in part, for the continued injury thereto caused by any further delay in compliance with Pretrial Order No. 5.

Since the conduct at issue here is that of the corporation through its agents, we believe that the cor-

poration, rather than any individual, is the appropriate respondent.

In its letter of June 15, defendant has indicated that one of its purposes in standing ready to accept a citation for contempt is its desire to test its contentions on appeal. For this reason, we believe it would also be appropriate for the Court, if it decides upon contempt as a sanction, to make specific findings of fact and conclusions of law concerning defendant's waiver of privilege and subsequent refusal to produce the documents. There appears, however, to be a distinction, not addressed in the letters and other papers filed in this Court by defendant, on the appealability of civil and criminal contempt proceedings. In *Fox* v. *Capitol Co.*, 299 U.S. 99 (1936), the Supreme Court noted that "the rule is settled . . . that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." This rule was noted in a dissenting opinion filed in the Court of Appeals upon defendant's attempted appeal from the entry of Pretrial Order No. 5. See *International Business Machines Corp.* v. *United States*, 471 F.2d 507, 517, 519 n. 3 (1972). On the other hand, "where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review." *Penfield Co.* v. *S.E.C.*, 330 U.S. 585 (1947). The rule appears to be that an appeal will lie from such a

judgment of both civil and criminal contempt. In the light of these authorities, the government's statement in its expedited opposition to IBM's motion in the Supreme Court for a stay, to the effect that an order adjudging IBM in civil contempt is appealable to that Court, was erroneous. We do not believe, however, that the question of appealability should enter into this Court's determination of an appropriate sanction. Rather, as indicated above, the sanction should turn on the policies of law to be vindicated. It would, therefore, be inappropriate for the government to object to any sanction this Court might impose to vindicate these policies solely on the ground further review might result.

In the event the Court should find defendant to be in criminal contempt, the government believes that proceedings in this Court must continue while any appellate review which defendant may invoke is carried out. Accordingly, although we believe the Court's order with respect to waiver of any privilege to be correct, it may well be that the documents being withheld by defendant are in fact of such a character that there is no privilege attached to them so as to be the subject of such a waiver. Therefore, the government suggests that if this Court holds the defendant to be in either civil or criminal contempt and if defendant invokes such appellate remedies as it may have, this Court should direct that documents which are the subject of Pretrial Order No. 5 be submitted to the Special Masters, together with other allegedly

privileged documents, for a determination of the question as to whether or not they were in fact privileged absent waiver.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: /s/ Raymond M. Carlson
RAYMOND M. CARLSON
Attorney, Department of Justice

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 538058 287

SUPREME COURT, U. S.

MAY 6 197

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,

Respondents.

REPLY MEMORANDUM FOR IBM

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May 6, 1974.

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,

Respondents.

REPLY MEMORANDUM FOR IBM

This reply memorandum is submitted to show that the Government's arguments here why this Court should not review the district court's Contempt and Waiver Orders and the jurisdictional rulings by the court of appeals are based on errors or misconceptions about the proceedings below and their significance.

Most strikingly absent from the Government's papers is any real defense of the Waiver Order itself. That Order was entered without any findings of fact as to how "waiver" occurred, or any consideration of the circumstances. Those circumstances were: There was no intention to "waive" any privilege; the production of the documents in issue here was compelled by an order of another federal district court in a case in which the Government was not a party. The private litigant receiving the documents was ordered to hold them in confidence, and the court

ordering production held claims of privilege were not waived by the fact that these documents were inadvertently produced. Those rulings have been followed by other courts (except for the district court below). Thus, while IBM has been engaged in other antitrust cases since the documents in issue were produced, in those cases the plaintiff was not permitted access to these documents.

The concept of "waiver" adopted by the district court is fundamentally inconsistent with the standard set forth in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—that "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"—a standard which unquestionably was not but should have been applied here.

Instead of dealing with the significance of the matters presented in light of their importance and impact on fundamental rights and the proper and efficient administration of justice, the Government opposes review with procedural arguments—cast in terms of a policy against any appellate review before there is a judgment after trial in its antitrust case. Those arguments are seriously flawed in their premises:

FIRST. The Government claims that review of the Contempt and Waiver Orders on the merits "would result in a right of appeal for *all* pretrial discovery orders". (Op. in No. 73-1065, p. 25; emphasis in original) That is not true.

Preliminarily, it is not accurate to state that a "pretrial discovery order" is involved here. The Waiver Order held IBM "waived" privilege claims by compelled, unintentional production of privileged documents. It cannot be characterized as a "discovery" order, because, under Rule 26(b)(1), Fed. R. Civ. P., "discovery" only extends to matters "not privileged". Moreover, in issue now also is a Contempt Order, which, by imposing a $150,000 daily fine, hardly resembles a "pretrial discovery order".

Rather, it is a punitive sanction which would have foreclosed any appellate review, except for the stay ordered by a unanimous Second Circuit (over the Government's opposition) after that Court held two-to-one that it was without jurisdiction to review it.

Moreover, we certainly have never claimed or suggested a "right of appeal for *all* pretrial discovery orders". We are dealing with circumstances having nothing in common with "*all* pretrial discovery orders":

> —Here, the perniciousness of the district court's "waiver" ruling is its extinction of attorney-client and work-product privileges while holding that the purpose and intention to protect those privileges, as well as an order of another court safeguarding them, are irrelevant.
>
> —Here, appellate review is sought now because, once privileged documents are disclosed to the Government, IBM and Cravath are irreparably injured and the proceedings below are irretrievably tainted. That damage cannot be undone. The Government's position is that any appellate review must be later, but that necessarily assumes there will be a judgment after trial in the Government's favor, that it will, under the Expediting Act, be reviewed by this Court, and that there can be a reversal because the Waiver Order erroneously infected the trial. Apart from the protection of rights fundamental both to the adversary system and to self-enforcement of the laws, review now rather than later eliminates a risk of trying this case twice (and that, as can be seen from the massive discovery in progress and already completed, which is outlined below, would be a tremendous effort making relatively insignificant the amount of time and effort expended in these proceedings).

—Here, the district court's Waiver Order may greatly complicate the chore of administering the progress of cases through the courts. If one federal judge can retroactively undo another federal judge's protective order under circumstances like those present here, it will be very difficult for the courts to accommodate and compromise claims in the interest of expedition because litigants will not be able to rely upon stipulated or ordered protection of rights and may instead find, as here, that compliance with the orders of one court results in a "waiver of rights" theory in another.

—Here, whatever view the Court may entertain about the reviewability of the Waiver Order standing alone (Nos. 72-1173, 72-1661, 72-1662), the effort by the Government and the district court further to shield it and the Contempt Order from review by the "civil" trappings adopted for the Contempt Order should not be tolerated. It is one thing to recognize arguably discretionary powers, but quite another to let stand an arbitrary exercise of power designed to thwart any review. What happened below, contrary to the Government's suggestion, just had no relationship to what ordinarily happens in "*all* pretrial discovery orders", and it is precisely because this is an extraordinary situation that the issues of reviewability are different from those present in other situations.

In sum, grant of review here under the circumstances would not depart from accepted tests concerning what can be reviewed and what cannot. On the other hand, the denial of a review on the merits is dangerous as a precedential matter. Then there would be no ruling on the propriety of what happened below, and what happened below (i) should not be immunized from review, (ii) offends the proper and efficient administration of justice for this and other cases, and (iii) extinguishes rights this Court has long protected, rights which were here correctly recognized by one federal district court and then undone by another.

SECOND. It is wrong for the Government to assert here that it has consistently adhered to an "unchanged contention that under the rule of finality, pretrial discovery orders are not appealable until final judgment." (Op. in No. 73-1064, p. 6, n.5, and Op. in No. 73-1065, p. 25, n.19) In successfully resisting review and stay of the Waiver Order the Government consistently urged that review could now be obtained if IBM or its representative would risk going into contempt and thereby demonstrate the good faith nature of the opposition to the Waiver Order. Yet when Government counsel sought the Contempt Order, they did everything in their power to obtain a non-reviewable order. Not only did Government trial counsel flatly oppose IBM's "Motion for Entry of a Plainly Appealable Contempt Order" (II App. F, at 138a; II App. K), he also urged that the Contempt Order be issued against IBM, rather than its representatives, and that the adjudication be for civil contempt only.

Thus, the Government's suggestion here that it was "cautioning" the district court that a civil contempt was "interlocutory and not appealable" (Op. in No. 73-1064, p. 3) is at best a less than candid statement of its position since it was affirmatively doing everything it could to block the route to appellate review it once held open. And the Government's statement that its position is "unchanged" was undercut by Government trial counsel's urging the district court that its prior position in this Court and in the Second Circuit should not be "looked at or honored". (II App. B, at 15a)

Our point here is not that IBM or its counsel were misled or misinformed by Government counsel as to what kinds of contempt are appealable. The point is that something more should be expected of a Department of Justice, particularly when fundamental rights are at stake, than to suggest to this Court and to the Second Circuit that review could be obtained by the contempt route (and by the very suggestion invite recourse thereto), and then to

use every opportunity in the district court to block an appeal by labeling as "civil" what is at least partly an order of "criminal" contempt, because it was entered to vindicate the authority of the court and punish IBM for defiance, without regard to what, if any, harm was caused the Government as a litigant.

The point is that the substance of what was done here cannot be obscured or insulated from review by formalistic labels.

THIRD. The Government claims it is invoking "the rule against interlocutory appeals in government antitrust cases" because discovery below is "being delayed" (Op. in No. 73-1065, p. 15 and p. 24, n.18) by noncompliance with the district court's Waiver Order. The impression left by that assertion—that matters are at a standstill pending resolution of IBM's efforts to obtain review of the Waiver and Contempt Orders—is patently erroneous:

> (a) Discovery in the district court concerning the antitrust merits has been going forward without interruption stemming from these proceedings to review the Contempt and Waiver Orders, and the volume and scope of that discovery is enormous.* The plain facts are that, contrary to the impression given by the Government's papers here, the parties are en-

* The district court's Waiver Order was entered September 26, 1972. Since that time, there have been 27 days spent in pretrial conferences before Judge Edelstein, almost all of which were concerned with pretrial discovery on the antitrust merits. That discovery is continuing to this day at a very rapid pace. Between October 1972 and the end of last month (April 1974)—the time during which the Government suggests here that matters are at a standstill because of these proceedings—there have been 429 depositions taken covering 55,720 transcript pages. While that discovery undertaken by the parties is covering the entire computer industry, 100 deposition days and 12,316 pages of transcript during that period involved depositions of IBM employees.

gaged in all the discovery they can presently handle and that the pending proceedings in this matter have not delayed that discovery in the slightest.*

(b) IBM and Cravath have also done everything they could, and everything that has been asked of them, to expedite these proceedings. Initially, it was the Government which waited 17 months before asserting its waiver of privilege theory in the district court (doing so long after it had *agreed* to accept as production to it microfilm of all documents produced to the private party *except* the privileged documents). Even now, whatever credence might otherwise have been put in the Government's assertion of delay, that is completely undercut by the Government's long and unexplained delay in filing its present responses. The instant review applications, at the Government's request, were expeditiously filed by IBM and Cravath on January 7, 1974, within 21 days after the December 17, 1973, decision of the Second Circuit holding that it was without jurisdiction to

* Moreover, the documents covered by the Waiver Order (and a subsequent Government motion seeking a determination that IBM waived privilege claims to still more documents) are a minute fraction of all the documents produced by IBM in connection with this litigation. The volume of documents demanded from and produced by IBM has been unprecedented. Particular claims of privilege by the Government and by IBM are being reviewed by special masters appointed by the district court. The documents in issue here are not now part of the privilege proceedings before the special masters, however. The district court rejected the recommendation made by both IBM and the Government (Op. in No. 73-1065, pp. 29, 38-39), that, pending appellate resolution of this controversy, the documents in issue here be submitted to the special masters to test whether IBM's privilege claims were properly asserted. While progress is being made in the special master proceedings, they will not be completed for some time, and there is no conceivable or practical reason why access to the documents in issue here need be had on any different schedule than that being followed in the special master proceedings.

review the actions of the district court. Yet the Government waited until April 26, 1974, to file its responses in Nos. 73-1064 and 73-1065 and until April 30 to file in No. 73-1066, taking some 49 and more days beyond the 30-day period allowed for response under Rules of this Court, without giving any reasons therefor and without seeking an extension.* It is plain that neither the proceedings here nor the progress of the massive and complex antitrust action in the district court are being delayed by IBM's and Cravath's efforts to protect their fundamental attorney-client and work-product privileges.

FOURTH. The Government relies here (Op. in No. 73-1065, p. 19) on that portion of the opinion of the Court of Appeals which held that IBM "waived" its right to insist that there cannot be an order of "civil" contempt because IBM objected to the Government's offer to introduce evidence of harm to it. (II App. I, pp. 164a-165a) Then, on the next page of that brief (Op. in No. 73-1065, p. 20), the Government relies on that part of the opinion of the Court of Appeals which held that it would be "impossible to determine what harm is being suffered here by failure to provide this material for discovery" (II App. I, p. 166a).

The error and contradiction in the Government's position are self-evident. What the court of appeals thought was "impossible" to do—prove harm from nonreceipt of the documents—was precisely what the district court ruled irrelevant to the contempt hearing and what the Government recognized it must do to support an order of "civil" contempt.

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* The Government's responses were not timely even if time is computed from the district court's explicit denial on March 6, 1974, of Cravath's motion to intervene as of right and the filing on March 13, 1974, of the Supplemental Jurisdictional Statement in No. 73-1066.

When the Government offered what it claimed was proof of harm, we objected and the evidence was excluded. That objection is used by the Government to construct its second "waiver" theory, which is that, by objecting to its offer of proof, we "waived" our right to contest on appeal the district court's holding that we "waived" our privilege claims because we were responsible for there being no evidence of harm to support an order of "civil" contempt. That theory is wrong, as the Government well knows. It was the *Government* which sought an order blocking discovery concerning its fanciful claim that failure immediately to have the documents in issue was damaging it, and it was the order issued on that request which made the question of harm irrelevant to the proceedings below. Nevertheless, the *Government* inconsistently then tried to prove harm, and IBM's objection to the offer was made solely to conform the scope of the proceeding to what had previously been ordered at the *Government's* request.*

---

* Error in other aspects of the Court of Appeals' disposition of this matter on jurisdictional grounds is treated in our Petition for a Writ of Certiorari in No. 73-1065. The Government's apparent suggestion here of still another "waiver" theory—that some issue may not be before the Court because we did not file a Notice of Appeal to this Court from the Contempt Order (Op. in No. 73-1064, p. 2, n. 1; Op. in No. 73-1065, p. 3, n. 2, p. 26)—makes no sense under any view the Government has heretofore advanced about the requirements of the Expediting Act. This "waiver" theory also cannot be reconciled with the Government's earlier concession that this Court has jurisdiction to review under the All Writs Act, 28 U.S.C. § 1651. (Op. in No. 72-1661, p. 3) The proliferation of "waiver" theories should be checked by this Court, for "waiver" is too important and too serious a doctrine to be so readily grasped at for the purpose of defeating both substantive rights and appellate review.

CONCLUSION

For the reasons stated here and in our prior papers, this Court should grant appellate review of the merits of the Contempt and Waiver Orders and of the jurisdictional rulings by the court of appeals.

May 6, 1974.

Respectfully submitted,

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